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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred when it departed from the usual rule of deferring to a district court's findings of fact and exercise of discretion, and instead followed the recent trend of broadened appellate fact review.

2. Whether the court of appeals' reversal of both the district court's findings and its denial of a class action is such a derogation of the district court's duties as to call for an exercise by this Court of its supervisory powers.

3. Whether the court of appeals erred when it failed to adhere to the appropriate procedure for reviewing Title VII cases as determined by this Court in *Pullman-Standard v. Swint*, 102 S. Ct. 1781.

4. Whether the court of appeal's decision to certify a class action notwithstanding the district court's finding that the named parties could not represent the class is inconsistent with the decision of this Court in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395.

5. Whether the court of appeals departed from this Court's decision in *Hazelwood School District v. United States* when it disregarded petitioner's external labor statistics and instead relied solely upon the make-up of the petitioner's internal work force.

PARTIES INVOLVED

The parties involved in this petition are: Union National Bank of Little Rock, petitioner; and Melvin Paxton, Jr., Jerry Riley and Phyllis Mosely, and members of a class established by the court of appeals comprised of black employees who because of their race were denied promotions or received lesser salary increases at the time of their promotion than did similarly situated white employees during the period from January 1, 1974 to the time of completion of the trial, April 23, 1981, respondents.

STATEMENT IN COMPLIANCE WITH RULE 28.1

The petitioner is 80% owned by The Union of Arkansas Corporation, a one bank-holding company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Union National Bank of Little Rock, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding September 10, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 688 F.2d 552. It is set forth in Appendix A, *infra,* pp. 1a-39a. The opinion of the United States District Court for the Eastern District of Arkansas is reported at 519 F. Supp. 136. It is set forth in Appendix B, *infra,* pp. 40a-100a.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1982. It is set forth in Appendix C, *infra,* pp. 101a-102a. A timely petition for rehearing was denied on October 27, 1982. The order is set forth in Appendix D, *infra,* p. 103a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

Petitioner, Union National Bank, is a federally chartered bank with its main office and thirteen branches in Little Rock, Arkansas. It employs over 400 persons in the banking industry, in various divisions of professional, technical, managerial and clerical jobs.

The respondents are three individuals, Melvin Paxton, Jr., Jerry Riley and Phyllis Mosely and, members of a class established by the court of appeals which is made up of black employees who because of their race were denied promotions, or received lesser salary increases at the time of their promo-

tion, than did similarly situated white employees during the period from January 1, 1974 to the time of completion of the trial, April 23, 1981.[1] The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(4), 2201 and 2202 and 42 U.S.C. §§ 1981 and 2000e-5(f) ("Title VII"), which amended the Civil Rights Act of 1964.

An extensive trial was conducted successively before two district judges. After hearing testimony from eleven witnesses for fifteen days, the first trial judge, Chief Judge Eisele, recused himself. The second trial judge, Judge Woods, considered the record of the prior testimony taken before Chief Judge Eisele. He also heard testimony from thirty witnesses over a period of eleven days. Both judges heard testimony from three of the same witnesses, including testimony from petitioner's expert, Dr. James Gwartney, the petitioner's personnel manager, Joseph Zegler and intervenor Jerry Riley. The other witnesses heard by Judge Woods included five of respondents' witnesses, all black, and either employees or former employees of Union National, who denied that petitioner discriminated on the basis of race. Judge Woods concluded that the testimony of respondents' remaining witnesses was unpersuasive because each offered nonspecific, unsubstantiated, hearsay allegations of discrimination.[2]

The evidence in the case consisted of the testimony of many witnesses, exhibits, and a substantial analysis based on statistics and labor economics. Respondents' statistical presentation was largely in general terms, and at most supported an

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[1] The case, as it reached the appellate court, represented a consolidation of three cases. Paxton filed an individual and class claim on April 12, 1976. Katrina Terry and Phyllis Mosely intervened in the *Paxton* case on June 12, 1979. App. B, *infra*, p. 41a. Jerry Riley, Bobby Scott and George Spann intervened October 30, 1979. *Id.* On July 19, 1976, Norman Williams filed a second claim which was consolidated with *Paxton* on September 20, 1978. Harold Dominic Brown filed a third claim which was consolidated on August 28, 1979. On April 3, 1980, Bobby Scott was dismissed pursuant to settlement and Norman Williams' claim was dismissed pursuant to Fed. R. Civ. P. 41(b) on April 7, 1980. *Id.*

[2] Unless otherwise noted, references to the district court opinion are to Judge Woods' findings of fact and discretionary decisions.

inference of discrimination only in the areas of discharge and salaries. The district court considered the further analysis of petitioner's expert and concluded that "reasonable objective facts, unrelated to race, support[ed] the decisions to discharge,"[3] and that no significant difference existed when similarly situated persons' salaries were compared.

Stating that the "proof to the contrary [of respondents' claim] is overwhelming," App. B, *infra*, p. 53a, the district court found that respondents had not established a prima facie case, and ruled that even if one had been made out, the petitioner had rebutted it successfully.[4] The district court judge also held that respondents did not qualify as class representatives, and that the prerequisites of Fed. R. Civ. P. 23(a) had not been met. Accordingly, it denied a grant of class certification.[5]

The district court considered and dismissed the individual claims. With respect to intervenor Riley, the district court ruled that his average to above average skill, numerous meetings and memoranda evidencing his job deficiencies, and finally, testimony that he had less experience and skill than those promoted ahead of him, were all nondiscriminatory reasons supporting the petitioner's failure to promote him or to increase his salary.

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[3] App. B, *infra*, p. 53a. Petitioner's expert concluded that, with the exception of those employees who had been with the bank less than two years, no significant difference existed between the number of blacks and whites discharged. *Id.* at p. 51a. The difference appearing at the two year level, the district court concluded, gave rise to two possible inferences: first, that Union National, in its efforts affirmatively to recruit minorities, probably hired "high-risk" minority employees who because of their over-representation and poorer skills would accordingly be over-represented in the number of discharges; or second, that Union National selectively discriminated against only those blacks with less than two years experience. The district court concluded that the "high-risk" inference was more plausible than the selective discrimination inference.

[4] Indeed, Judge Woods expressed doubts, as had the first trial judge, of the wisdom of filing the suit because of its numerous flaws, which included inadequate discovery and adverse testimony elicited from respondents' own witnesses. App. B, *infra*, p. 43a.

[5] The district court decided that it was unnecessary to consider the fourth requirement of Rule 23(a), adequacy of representation, because of its conclusion on the individual claims. App. B, *infra*, p. 100a.

The court found that intervenor Mosely was not discharged because of her race and was instead discharged because she twice failed to obey a reasonable direct order of her supervisor after having been forewarned that a second refusal would lead to her discharge.

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. That court affirmed the district court's refusal to certify a class of black employees allegedly discriminated against in all terms and conditions of employment. The court of appeals, however, held that the district court had abused its discretion in failing to certify two subclasses; (1) black employees who were denied promotions or who had received lesser salary increases, and (2) black employees with less than two years of experience who were discharged. With respect to the discharge subclass, however, the court of appeals held that the plaintiffs and intervenors had failed to prove "a pattern and practice of racial discrimination against blacks in the discharge class," other than in the case of Phyllis Mosely. App. A, *infra*, p. 25a.

The court below found that all prerequisites of Rule 23(a) were satisfied, and then ruled on the merits of the promotional subclass, stating:

> [a]fter a careful review of the 6,000 page transcript and the 150 exhibits comprising this record on appeal, we are left with the firm conviction that the district court erred in holding that the bank did not discriminate against black employees with respect to promotions.

App. A, *infra*, p. 17a, *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The court of appeals considered several factors in deciding for respondents: the bank's subjective method of promotion and history of discrimination, evidence introduced on both the class action prerequisites and the individual claims and, finally, statistical proof. The appellate court found that the district court was wrong in accepting the petitioner's defense that an inference of discrimination was dispelled by a comparison of the Little Rock black labor pool and petitioner's black labor

pool. The appellate court also ignored the petitioner's evidence showing that the number of promotions of blacks within the bank's work force was at least proportional to the number of blacks as compared to whites in the total work force.[6] Instead it relied on a disproportionate number of whites receiving promotions in the upper levels of the bank's employees as the basis for comparing the number of black promotions. App. A, *infra*, p. 20a.

The appellate court also dismissed the bank's further defense to the promotion claim, namely, that a number of black employees within the bank were not objectively as qualified as some available white employees. App. A, *infra*, p. 22a. The appellate court stated that this was not supported by the record. It reviewed the bank's explanation for specific instances of failure to promote on the grounds of inadequate experience or lack of education, and found them unpersuasive.

The court below then considered the individual claims, and concluded that the district court erred in its dismissal of Riley's promotion claim.[7] The appellate court concluded that Riley "had more experience... he was better educated and he had a good work record." App. A, *infra*, p. 28a. The court below gave credence to Riley's testimony that he was qualified for a particular promotion and found no basis for the district court's decision to accept the testimony offered by the petitioner that the person promoted was better qualified.[8]

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[6] *See, e.g.* the district court opinion, App. B, *infra*, p. 70a, reflecting Defendant's Exhibit 34(a) (observed rate of actual black promotions exceeded expected rate for years 1974-80).

[7] The court of appeals considered and ruled favorably on the specific issue of Riley's promotion to lead control clerk, notwithstanding its admission that the district court had not addressed the specific issue and instead had addressed the overall promotion claim. The court of appeals explained:

> We have chosen . . . to treat the court's general conclusion . . . as its finding of fact on this issue. . . . We have done so because even if we afford that "finding" the deference an appellate court must give to the district court's findings of fact, it cannot stand.

App. A, *infra*, p. 27-28a.

[8] The court below stated that it could independently judge Riley's testimony because Judge Woods did not observe the witness but only read from the transcript. App. A, *infra*, p. 28a n. 23. It did not explain its rejection of the district court's favorable credibility determination on the bank employ-

(*footnote continues*)

With respect to Mosely, who was discharged for twice refusing to comply with instructions of a supervisor, the court below ruled that her work record, her overtime record, and the statistics showing discrimination in the promotion subclass established a prima facie case of discrimination.[9] It concluded that the district court's findings to the contrary were clearly erroneous. The court of appeals also ruled that Mosely had established a claim of discrimination in promotion on the basis of her education, experience and work record, and evidence that the bank promoted persons with less or no experience over Mosely. The court of appeals stated that petitioner's articulation of a legitimate explanation—that a more qualified person was hired—was insufficient.[10]

With respect to Paxton, the court of appeals determined that the decision of the district court against him was not clearly erroneous. It did, however, direct an injunction against the bank requiring it to refrain from making inquiries such as it had made of Paxton relating to his filing of charges and his dissatisfaction with the bank.[11]

The court of appeals also directed the entry of a decree "which will insure that race will not be a factor in future promotional decisions by the bank." App. A, *infra*, p. 35a. It

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(*footnote continued*)

ees' testimony, or why the factual determination was not one allocated to the presiding district judge rather than to the court of appeals. And, the court below failed to consider that Judge Woods did, indeed, personally hear part of Riley's testimony.

Moreover, in *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982), "the District Court's findings of fact were entirely based on documentary evidence." 102 S. Ct. at 1796 (Marshall, J., dissenting). Yet this Court held the district judge's findings should not have been reversed by the court of appeals.

[9] The court below also found important the fact that no other employee had been discharged for the same reason that Mosely was discharged and that the bank's Personnel Handbook did not make the offense a ground for discharge. App. A, *infra*, p. 33a. The district court had found as a matter of fact that the refusal to follow a reasonable order was a flagrant offense for which a supervisor could terminate an employee. App. B, *infra*, p. 57a.

[10] The district court did not make a specific finding on the issue of whether Mosely had been discriminatorily denied a promotion.

[11] The court of appeals affirmed the action of the district court in dismissing the claims of Katrina Terry, George Spann and Harold Brown, as well as Paxton's claim of wrongful discharge. App. A, *infra*, p. 34a.

spelled out in considerable detail the internal operating procedures and standards which the bank must adopt in order to meet this requirement.

REASONS FOR GRANTING THE WRIT

I. The Appellate Court Erred by Engaging in an Independent Fact Review of the Merits of the Individual and Class Claims.

A. The Appellate Court Independently Evaluated the Evidence, Contrary to This Court's Decisions on the Proper Scope of Appellate Review.

This Court set forth the definitive test for appellate review of a district court's findings of fact in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948):

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

333 U.S. at 395.

Recently this Court reiterated the standard for appellate review of a district court's findings of fact in a Title VII suit:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous.

Pullman-Standard v. Swint, 102 S. Ct. 1781, 1789 (1982).[12] Through these decisions, it is established that appellate courts

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[12] In *Pullman*, the issue before this Court was "whether a Court of Appeals is bound by the 'clearly erroneous' rule of Fed. Rules Civ. Proc. 52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system . . . ." 102 S. Ct. at 1783. This Court reversed the Fifth Circuit's finding of intent to discriminate because the court of appeals, contrary to Rule 52, reached that conclusion by independently reviewing the district court's "ultimate" finding that no intent to discriminate existed.

may not make their own independent redetermination of the facts found below.

Appellate courts are similarly obligated to abide by *discretionary* decisions made by a district court judge. The general rule provides that a district court's exercise of discretion will not be overturned unless the appellate court decides the district court has "abused its discretion."[13] Reasonable discretionary decisions are deemed unassailable because of the district court judge's personal participation in the dynamics of the trial.[14]

The exercise of a district court's discretion extends to the decision to certify a class and to name the proper class representatives in Title VII cases as well.[15] Thus, regardless of the substantive underlying claim, an appellate court must be convinced that the district court was in clear error before it can rule that the district court abused its discretion in denying certification.

Notwithstanding the "definitive test" for Rule 52, and the clear rule that great deference is due to trial courts when they exercise their discretion, appellate review standards have not been carefully followed. First, with respect to the "clearly erroneous" standard, appellate courts have in recent years frequently avoided the requirements of Rule 52(a). This Court has rejected the "ultimate" and "subsidiary" fact distinction, one attempt to avoid the "clearly erroneous" standard.[16] This Court has also stated that an appellate court may not "substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts

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[13] 3B Moore's Federal Practice ¶ 23.50 (2d ed. 1982). The "abuse of discretion" standard has been likened to "a pasture in which the trial judge is free to graze;" that is, an area in which the trial judge may be wrong but not subject to reversal. Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1978).

[14] Rosenberg, *supra* note 13, at 183.

[15] 3B Moore's Federal Practice ¶ 23.50 at 23-437 (a district court's determination of a class action "should be given great respect by a reviewing court"). *See also Wright v. Stone Container*, 524 F.2d 1058 (8th Cir. 1975).

[16] *See, e.g., Pullman-Standard v. Swint, supra* (in a Title VII case the "ultimate" finding of an intent to discriminate is subject to Rule 52).

another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'" *Inwood Laboratories v. Ives Laboratories,* 102 S. Ct. 2182, 2190 (1982), *citing United States v. Real Estate Boards,* 339 U.S. 485, 495 (1950).

An appellate court likewise may not follow the course criticized in this Court's decision in *Pullman*—an acknowledgement of the "clearly erroneous" rule, followed by an independent factual review.[17] Rather, this Court has made it clear that off-hand acknowledgment of the Rule 52 standard is not sufficient when an appellate court's review

> strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Pullman-Standard v. Swint, supra, 102 S. Ct. at 1791.[18] The same possibility exists to permit an independent appellate

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[17] Indeed, one commentator, twenty-five years ago, recognized this possibility of paying "lip service" to the review standards, although he suggested that appellate judges would not commit such an error:

> The courts which have disregarded Rule 52 in substituting their judgment for that of the trial court *could* accomplish the same purpose while complying with the rule merely by announcing that the finding with which they disagree is "clearly erroneous." But I think we can safely assume that appellate judges do make a conscientious attempt to confine their review to that authorized by law, and that, so far as human frailties permit, they do not regard a finding as clearly erroneous merely because it differs from the finding they might themselves have made.

Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn. L. Rev. 751 at 770 (1957) (emphasis in original). The frequency with which other commentators have noticed the problem, and the increasing number of cases reaching this Court on this issue, undermine the author's assumption. Moreover, since Professor Wright's article appeared, this Court has closed at least one avenue by which an appellate court can overtly escape compliance with the Rule. *See, e.g., Pullman* (error to designate facts as "ultimate" in order to avoid application of "clearly erroneous" standard).

[18] This Court's opinion in *Pullman* demonstrates that even a recital of the "definite and firm conviction" language of *Gypsum* is insufficient adherance when the appellate court's actual decision indicates action to the contrary. *Pullman* at 1781-83.

evaluation of the decision to certify a class—an acknowledgement of the abuse of discretion standard, as a prelude to an independent factual review.

Application of these reviewing standards to the decision below indicates that the court of appeals did not carefully defer to the district court's findings of fact and class certification conclusion derived after the twenty-six day trial. The appellate court's opinion shows instead an "independent consideration of the totality of the circumstances it found in the record." In not one instance in its opinion does the court below refer to Rule 52(a). At one point in the opinion it refers to the rule in *Gypsum*, yet in so doing the appellate court admits it has engaged in an independent review. App. A, *infra*, p. 17a. The appellate court refers to several of the district court's findings as "in error," yet its discourse on new facts not considered by the district court[19] shows no deference to the district court's findings of fact that petitioner had not discriminated on the basis of race. The appellate court abandons the district court's choice of inference on the discharge claim and instead accepts the conclusion with the more "sinister" cast.[20]

The treatment of the individual claims by the court of appeals also reflects the sort of independent review disapproved by this Court in *Pullman* and *Inwood*. The court of appeals held that Riley was successful in establishing discrimination, notwithstanding the district court's findings of fact to the contrary, and its determinations with respect to the credibility of petitioner's witnesses. As to Mosely's claim, the court of appeals entirely ignored the district court's finding of fact that an offense for which summary dismissal is authorized includes an employee's "refusing to follow a reasonable order. . . ." App.

[19] For example, the appellate court found that the receipt of unemployment compensation benefits by former bank employees was relevant to the inference of discrimination. App. A, *infra*, pp. 23a, 33a n.27. The district court's findings of fact do not demonstrate that this factor was relevant to its decision.

[20] *Inwood*, *supra* at 2190. *See, e.g.*, the "high-risk" explanation discussed in note 3, *supra*, p. 4.

B, *infra*, p. 57a. And, the court below independently reviewed the promotion claim of respondent Riley, though it was not addressed by the district court and, indeed, the appellate court ruled on the merits of that claim.

The decision below that the trial court abused its discretion in denying class certification to two subclasses of discriminatees is similarly in error. The court of appeals made its own review of the record as a basis for its determination that the plaintiffs had succeeded on the merits of the promotion subclass. The court of appeals disregarded the district court's finding that too few discriminatees existed to meet the numerosity requirement and instead ruled that the persons whom the district court found not to be credible witnesses satisfied those requirements.

B. The Decision Below Raises a Basic Issue of the Scope of Appellate Review Which Merits Exercise of This Court's Supervisory Powers.

The decision below raises an important and recurring issue, as evidenced by this Court's recent decisions. In the absence of an exercise of this Court's supervisory powers, the decision will stand as encouragement to other courts to broaden the scope of appellate review under both Rule 52(a) and the abuse of discretion standard. The consequence is to encourage appeals, thus adding to the volume of cases taken to appellate courts, as well as distorting the appropriate relation between trial and appellate courts.

Commentators have recognized the trend of expanding appellate review and have noted its adverse consequences. The deleterious results have been described by one commentator as an impairment in the "confidence of litigants and the public in the decisions of the trial courts and a [multiplication in] the number of appeals."[21] Others cite a concomitant lowering in the

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[21] Wright, *supra*, 41 Minn. L. Rev. at 781. Professor Wright saw the expansive trend as manifesting itself in four specific areas:

> review by the appellate court of the size of verdicts; orders for a new trial where the verdict is thought to be contrary to the clear

(*footnote continues*)

morale of district court judges, a decrease in the likelihood of settlements at the trial level and an increasing disrespect for our legal system as consequences of the trend.[22] When a district court's exercise of discretion is afforded little deference, there are similar adverse results.[23] Wide review of factual and discretionary determinations invites appeals and contributes substantially to the volume of cases in the courts of appeals —and in this Court.[24]

The trend to expand appellate review is not only of adverse consequence to the system for the administration of justice—it is also entirely inconsistent with this Court's oft-repeated determination of the orderly and efficient delegation of judicial duties. District courts are given the responsibility of fact finding because they are adept at that function, and because they are in the best position to judge the credibility and demeanor of witnesses. In this case, Judge Woods personally heard thirty of the thirty-eight witnesses, including that of the petitioner's expert and intervenor Riley. Appellate courts, in

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(*footnote continued*)

> weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence; and expanded use of the extraordinary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled.

Id. at 751-52. He concluded that the history of appellate review of these four areas "should be enough to persuade anyone that appellate power is rapidly on the increase." *Id.* at 778.

[22] Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous" Rule Being Avoided?* 59 Wash. U.L.Q. 409, 426-27 (1981).

[23] Rosenberg, *supra* note 13, at 187.

[24] As Judge Rubin wrote (when he was a district judge): "The first and simplest way to reduce the appellate workload is to decrease the rate of appeal from trial court dispositions." Rubin, *Views from the Lower Court,* 23 U.C.L.A. L. Rev. 443, 451 (1976). When appellate courts freely review factual and discretionary decisions, appeals are encouraged, and the volume of cases brought up for review inevitably increases.

contrast, are left with reviewing a "cold" record.[25] These same considerations apply when a district court exercises its discretion in matters such as class certification.[26]

Even in cases where both the district court and appellate court could be considered equally proficient at reviewing the record, that conclusion disregards the proper role of appellate courts. The proper and primary task of appellate courts is not to find facts but to "interpret the law."[27] Thus, neither efficiency nor jurisdictional goals are served by permitting appellate courts to expand their review of the district court's findings of fact and exercise of discretion. Exercise of this Court's supervisory powers is needed to evaluate this clearly developing movement toward broadening the scope of appellate review.

II. Because of a Failure to Limit the Scope of Review, the Decision Below Conflicts with This Court's Decisions on Appropriate Procedure in Employment Discrimination Cases.

A. The Decision Below Conflicts with This Court's Decision in Pullman-Standard v. Swint.

This Court set forth the general rule to be followed when an appellate court has determined that the district court has proceeded under an erroneous view of the law or has failed to make a finding of fact for that reason:

> [T]he usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are

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[25] *Inwood*, 102 S. Ct. at 2188-89 (clearly erroneous standard "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence").

[26] Rosenberg, *supra* note 13, at 182-83.

[27] *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the "Clearly Erroneous" Rule Been "Clearly Erroneous"?* 52 St. J. L. Rev. 68, 90 (1977). The author concludes that this is the very point most often ignored by proponents of a *de novo* review of the record by appellate courts.

> infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

Pullman, supra, 102 S. Ct. at 1791-92.

The court below failed to follow this "elementary" scheme. *Pullman, supra* at 1792. In the exact circumstances in which this Court has determined that remand is appropriate—and indeed, an appellate obligation—the court below failed to remand. Instead, it applied what it considered to be the appropriate legal standard[28] and made its own finding of fact.[29] This trend in the courts of appeals to make independent determinations of fact is of special importance in Title VII cases, in view of the great volume of such cases. This departure from the settled course of proper appellate procedure warrants review in light of *Pullman.*

B. The Decision Below Conflicts with This Court's Decision in *East Texas Motor Freight v. Rodriguez,* That a Class Should Not Be Certified When the Named Parties Are Not Adequate Representatives.

In *East Texas Motor Freight* v. *Rodriguez,* 431 U.S. 395, this Court considered an appellate decision which involved a district court's ruling that named plaintiffs could not represent a class in a proposed class action discrimination suit. The district court there dismissed both the individual and class claims. The court of appeals reversed, disregarding the district court's finding of plaintiffs' inability to represent the class, and instead certified a class and imposed class wide liability. This Court ruled that the appellate court erred in certifying a class when "it was evident by the time the case reached that court that the named plaintiffs were not proper class representatives." 431 U.S. at 403.

In the decision below, the appellate court was equally in error in its handling of the class certification issue. The court below failed to give proper deference to the district court's findings of fact that the named parties could not represent the

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[28] App. A, *infra,* p. 13a.

[29] App. A, *infra,* p. 14a.

class. Because of this error, the court of appeals incorrectly certified a class notwithstanding the fact that the weight of the evidence demonstrated that the respondents could not represent the class. Thus, the decision below conflicts with *East Texas Motor Freight.*

C. The Decision Below Conflicts With This Court's Decision In *Hazelwood School District v. United States*, on The Proper Use Of Statistics In Employment Cases.

In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), this Court approved the action of a court of appeals which had compared the racial composition of an employer's staff with the racial composition of the qualified public school teacher population in the relevant labor market. In reaching this result, this Court cautioned:

> when special qualifications are required to fill particular jobs, comparison to the general population . . . may have little probative value.

433 U.S. at 308 n. 13.

Contrary to this statement by this Court, the court below in effect ruled that all of petitioner's employees were equally qualified for all positions which became available for promotion. The court of appeals brushed aside the petitioner's showing of the qualifications of individuals available in petitioner's work force, and the methods used by the petitioner to select individuals for promotion, see *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and relied simply on undifferentiated internal work force statistics. In doing so, the court of appeals set up a standard which is self-defeating, since in the long run, it can inhibit minority recruiting and other affirmative employment policies as well. Under the rule of the court below, an employer who does well in affirmative minority hiring, is, by that fact alone, restricted in making decisions on promotion, despite the fact that proper standards for promotion may require qualities in employees which are not taken into account in the original hiring. This Court should review the decision below to correct this departure from this Court's approach in *Hazelwood*, enhanced as it was by the appellate court's independent fact review.

Conclusion

The decision below disregards the proper scope of appellate review. Instead of adhering closely to the "clearly erroneous" standard of Rule 52(a), the court of appeals engaged in an independent fact evaluation and reached its own conclusion that petitioner discriminated against respondents. Instead of deferring to the district court's discretionary denial of a class certification, the appellate court independently reviewed the record and certified two narrow classes of its own definition. Comparison of the two opinions below clearly indicates that the appellate opinion does not reflect the district court's findings of fact, and shows instead an independent factual evaluation by the appellate court. Because of a failure to confine itself to the district court's findings, the court below similarly departed from both the appropriate standard of appellate review for discretionary decisions, and the proper procedure outlined by this Court for Title VII cases. Finally, the decision below does not comply with this Court's decision on the proper use of statistical proof.

Because of these erroneous decisions, there is no support for the injunction ordered by the court of appeals, and that, too, should be reversed.

This sort of "free-wheeling" by appellate courts is a matter of special importance in Title VII cases. It is a considerable cause of (1) the difficulty in settling cases out of court, (2) an increase in the number of appeals, (3) uncertainty in the law, and (4) to an increasing extent, disrespect for the judicial process. District courts should be the primary fact finding tribunals. It is clear, however, that courts of appeals take ever-widening views of their roles with respect to facts and judicial

discretion. This Court should grant review in this case in order to clarify the appropriate role of appellate courts on these questions.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 82-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

This Supplemental Brief is filed in view of this Court's recent decision in *United States Postal Service v. Aikens,* 51 U.S.L.W. 4354, decided April 4, 1983.

In the *Aikens* case, as in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court outlined the appropriate allocations of proof for Title VII cases. Under those decisions, the district court is the appropriate fact-finder. In such cases, the district court is to determine (1) whether the plaintiff has established a prima facie case, and (2) whether, in turn, the defendant has articulated a "legitimate, non-discriminatory" reason for his employment decision. After considering whether the proferred explanation is pretextual, the fact-finder must then (3) determine on all the evidence whether the employment decision was intentionally discriminatory. The burden of persuasion in the final determination is on the plaintiff. *Aikens,*

supra at 2-4. This Court further directed that if there is misapplication of this proof scheme, there should be a remand of the case to the district court, so that the fact-finder may reconsider the ultimate question of discrimination. See *Aikens, supra* at 4-5.

In the present case, the district court's opinion demonstrates its total adherence to the proof scheme approved by this Court for Title VII cases. The district court ruled that respondents had not established a prima facie case. However, the court nevertheless then assumed that the respondents *had* established a prima facie case. Pet. App. B at 97a. Based on that analysis, the district court then ruled that petitioner had *more than sustained* its burden of articulating a nondiscriminatory reason for its employment decisions. *Id.* Finally, and precisely as ordered by this Court in *Aikens,* the district court considered the respondents' ultimate burden of proof and ruled that the "plaintiffs and intervenors have failed to sustain this ultimate burden of proof or persuasion." *Id.*

Notwithstanding the district court's proper application of the proof scheme reaffirmed by this Court in *Aikens,* the appellate court below reversed those findings as being "clearly erroneous." Pet. App. A at 17a. It did so notwithstanding its specific recognition that the district court had adhered to such proof scheme, Pet. App. A at 18a, 22a, 25a, 27a, 28a, 32a, and 33a, a recognition which should have impelled it to the conclusion that it was necessarily engaging in a prohibited review of ultimate factual determinations. Notwithstanding and contrary to this Court's decision in *Aikens* that the district court is the appropriate fact-finder in discrimination cases, as in all civil litigation, the appellate court below did not remand to the district court. The appellate court instead engaged in an independent review of the facts found below.

This Court's decision in *Aikens* emphasizes the basic fact-finding responsibility of the district court. If the decision below remains unreviewed, it will impair the clarification made by the *Aikens* decision. A clear and unequivocal mandate based on the teachings of *Pullman-Standard v. Swint,* 102 S. Ct. 1781

(1982), and *Inwood Laboratories v. Ives Laboratories*, 102 S. Ct. 2182 (1982), as supplemented by *Aikens*, is needed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 81-1650

MELVIN PAXTON, JR.; and KATRINA E. TERRY; PHYLLIS MOSLEY; JERRY RILEY; GEORGE SPANN,
Appellants,

v.

UNION NATIONAL BANK, a corporation,
Appellee.

No. 81-1656

HAROLD DOMINIC BROWN,
Appellant,

v.

UNION NATIONAL BANK OF LITTLE ROCK,
Appellee.

No. 81-1657

MELVIN PAXTON, JR.; and KATRINA E. TERRY; PHYLLIS MOSLEY; JERRY RILEY; GEORGE SPANN,
Appellees,

v.

UNION NATIONAL BANK, a corporation,
Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

Submitted: February 8, 1982
Filed: September 10, 1982

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

This is an appeal from a judgment of the United States District Court for the Eastern District of Arkansas denying each of the named plaintiffs and intervenors relief, refusing to certify a class action and holding that the Union National Bank of Little Rock did not discriminate against black applicants or employees in any aspect of the employment relationship. We affirm the district court insofar as it denied relief to Melvin Paxton, Katrina Terry and George Spann, and to the extent that it refused to certify a class of black applicants. We hold, however, that Jerry Riley and Phyllis Mosley proved that they were denied promotions on account of their race, and that Mosley was discriminatorily discharged. We further hold that the district court erred in refusing to certify two subclasses of black discriminatees—those discriminated against with respect to promotions and those discriminatorily discharged—and in failing to grant relief to the promotion subclass.

We reverse and remand to the district court with directions to it to award appropriate relief to Mosley and Riley, and to the promotion subclass.

I.

Procedural History

These consolidated Title VII and section 1981 actions were brought by Melvin Paxton and Harold Dominic Brown against the Union National Bank of Little Rock, Arkansas, alleging race discrimination in hiring, testing procedures, promotions, discharges, job assignments, compensation and other terms and

conditions of employment.[1] They brought suit on their own behalf and on behalf of a class alleged to consist of "all black individuals who are (1) employed by defendant; (2) have sought employment with defendant, but have been refused due to race; (3) might seek employment with defendant; (4) have been employed by defendant and have been adversely affected by defendant's discriminatory practices and policies."

Five additional black persons, Katrina Terry, Phyllis Mosley, Jerry Riley, Bobby Scott and George Spann were granted leave to intervene as plaintiffs. Terry, Mosley and Spann were former employees of the Union National Bank, while Riley and Scott were employees at the time of the trial. Bobby Scott's case was settled and dismissed prior to trial.[2]

The plaintiffs and intervenors moved to certify the litigation as a class action pursuant to Fed. R. Civ. P. 23. The district court, Judge G. Thomas Eisele presiding, began an evidentiary hearing on the certification issue on April 7, 1980. Some time later, the court, with the apparent acquiescence of the parties, informally decided to merge the certification hearing with the trial on the merits and to reserve a decision on the certification issue until the trial was completed. The trial was recessed on April 18, 1980, and not resumed until August 12. On October 21, after fifteen days of hearings had been held, Judge Eisele recused himself. This case was then assigned to Judge Henry Woods. Judge Woods stated that he would not rehear the witnesses that had been called while Judge Eisele was presiding and directed the parties to prepare a transcript of the prior proceedings. He resumed the trial on April 7, 1981, and completed it on April 23, 1981, after eleven additional days of testimony. At the close of the evidence, he refused to certify a class and ruled against the plaintiffs and intervenors on their individual claims.

---

[1] Norman Williams, a former black employee of Union National Bank, also filed a Title VII complaint making similar allegations against the bank. His case was dismissed before trial without objection pursuant to Fed. R. Civ. P. 41(b).

[2] Scott testified at trial. His testimony was considered by the court as relevant to the class claims and will be similarly considered by this Court.

The court treated the case as one involving disparate treatment.[3] It held that the class action failed because the plaintiffs and intervenors had not sustained their burden of proving that Union National Bank discriminated against any class of its employees, and because the plaintiffs had not met the requirements of Rule 23. It found that the plaintiffs had failed to prove a prima facie case of discrimination with respect to any aspect of the employment relationship and that even if they had, the defendant had sustained its burden of articulating a legitimate nondiscriminatory reason for its employment decisions with regard to the six named plaintiffs and intervenors and all other employees whose names had been suggested as putative discriminatees.

On appeal, the plaintiffs and intervenors contend that the court erred in failing to certify a class, and in denying relief to the class and named plaintiffs and intervenors.

---

[3] An argument can be made that the promotion class claims should have been decided under the discriminatory impact theory. *See Williams v. Colorado Springs, Colo. Sch. Dist.*, 641 F.2d 835, 839-842 (10th Cir. 1981). As we detail, *infra*, the plaintiffs proved that the racial composition of the bank's work force at most above-entry levels does not reflect the composition of available qualified persons in the relevant labor pool. The court could have concluded from this that the sum of the defendant's promotion methods, although not administered with a discriminatory intent, impacted more heavily on blacks in the bank's work force. *See Vuyanich v. Republic Nat. Bank of Dallas*, 521 F.Supp. 656, 662 (N.D. Tex. 1981). The bank would have then had to show that the disparate results were attributable to identifiable, neutral personnel practices that were necessary to its business. *Id.*

We will, however, review the promotion class claims under a disparate treatment theory. The plaintiffs are not prejudiced by this approach because of our holding, *infra*, that the plaintiffs' proof was sufficient to find a pattern or practice of intentional racial discrimination in the bank's promotion decisions. The defendant is not prejudiced either because, in contrast to the rule in disparate impact cases, the bank was never forced to assume the burden of persuasion as to any aspect of this case.

With respect to the discharge class, the trial court properly tried it as a case involving disparate treatment. The plaintiffs did not allege that any facially neutral employment policies impacted more heavily on blacks. They simply alleged that the bank had intentionally discriminated against blacks by discharging them because of their race.

II.

General Background

The Union National Bank is a federally chartered bank with a main office and thirteen branches in Little Rock, Arkansas. The bank has been owned by Herbert H. McAdams, an attorney and successful northwest Arkansas banker, since 1971.

The bank hired very few black persons prior to 1973. In 1973, McAdams undertook an effort to develop business from black businesses and workers. In furtherance of this goal, McAdams directed Joseph E. Zegler, a vice president and personnel officer of the bank, to institute an affirmative action program designed to bring more black employees into the bank. Zegler published a personnel policy manual, which contained an equal opportunity policy,[4] actively recruited black persons for employment, and initiated a course for them in basic bank training. Black persons were hired into the bank in numbers approximating their numbers in the work force in the Little Rock area.

---

[4] The manual stated in part:

> It is the policy of Union National Bank to implement affirmatively equal opportunity to all qualified employees and applicants for employment without regard to race, creed, color, sex, religion, or national origin. Positive action shall be taken to insure the fulfillment of this policy, including: 1. Hiring, placement, upgrading, transfer or demotion. 2. Recruitment, advertising or solicitation for employment. 3. Treatment during employment. 4. Rates of pay or other forms of compensation. 5. Selection for training. 6. Termination. This policy is consistent with the requirements and objectives set forth by the Presidential Executive Orders.
>
> Our objective is to obtain individuals qualified and/or trainable for positions by virtue of job related standards of education, training, experience and personal qualifications.
>
> Responsibility for insuring compliance and implementation of the Bank's policy on equal employment opportunity is assigned to the Personnel Director. The Executive Committee will review this policy every twelve months and measure the results against these stated objectives.

NUMBER OF EMPLOYEES AS OF DECEMBER 31

Year	Total	White	Black	Percent Black
1974	332	293	39	11.8
1975	316	262	54[5]	17.1
1976	343	288	55	16.0
1977	393	320	73	18.6
1978	408	336	72	17.7
1979	441	362	79	17.9
1980	432	358	74	17.1

Most of the black employees were hired into entry-level positions.

The total number of persons employed by the bank grew from 332 in 1974 to 432 in 1980. The turnover rate among employees during the same period was very high, approximating forty percent per year.

The average educational level of black persons employed by the bank during this period was 13.1 years; the average for white employees was 13.5 years. The bank did not preserve the records with respect to the applicant pool; thus, the record does not indicate the number of blacks that applied to the bank for employment or the education and experience of those that did apply.

III.

ANALYSIS

Our first subject of concern is the timing of the district court's decision with respect to class certification. These consolidated actions were filed on April 12, 1976, and September 25, 1978. Extensive discovery was undertaken by the

[5] This figure includes the fifteen black graduates of the basic training school instituted by the defendant. The school was discontinued in 1977 or 1978 when it became clear that the banks in Little Rock were not hiring its graduates.

parties. On April 7, 1980, the court began evidentiary hearings on the propriety of maintaining the consolidated suits as a class action, telling the parties that

> [w]e had a terrible experience in this court of having a moratorium on civil cases for years. Class actions were filed and they sat here for years, and we've been faced with arguments that people who might have asserted their individual claims did not do so in reliance upon the hope that they would be a member of a class and get benefits that way four or five years after the event.
>
> So I think there's been a suggestion that from the point of view of the plaintiff that the earlier the class is certified, the fewer who are left out of that class
> * * *
>
> Then the defendants have a vital stake in an early determination because of the whole scope of the trial on the merits is thereby affected if there's going to be a class at all, and so I think what would have to be done, absent agreement of the parties, there's very little you can't do, that the Court is going to have to take it up preliminarily and make a certification or decide on class at the earliest practicable time.

The subsequent decision to delay certification until after the trial was completed, notwithstanding the apparent acquiescence of the parties,[6] "is directly contrary to the command of subdivision [23](c)(1) that the court determine whether a suit denominated a class action may be maintained as such '[a]s soon as practicable after the commencement of [the] action * * *.'" *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178 (1974). *See Horn v. Associated Wholesale Grocers, Inc.,* 555 F.2d 270, 273 (10th Cir. 1977).

It is rarely appropriate for a court to delay the certification decision until after a trial on the merits. *See Eisen v. Carlisle &*

[6] We assume that the agreement was an informal one reached in chambers, as there is no record of it in the transcript.

Jacquelin, supra, 417 U.S. at 177-178; *Horn v. Associated Wholesale Grocers, Inc., supra,* 555 F.2d at 274; *Peritz v. Liberty Loan Corp.,* 523 F.2d 349, 353-354 (7th Cir. 1975). It was not necessary to do so here. The discovery undertaken by the parties and the evidence adduced during the early stages of the certification hearing should have provided the court with sufficient information to resolve the question of whether a class action was an appropriate vehicle for plaintiffs' claims. If the court was still in doubt as to the propriety of a class action, it could have made the certification "conditional," and altered or amended its ruling at any time prior to completion of the trial. *See* Fed. R. Civ. P. 23(c)(1).

The prejudice inherent in delaying the certification determination until after trial has been thoroughly explored in the context of litigation under subdivision (3) of Rule 23(b). The court's concern in Rule 23(b)(3) suits has been to prevent "one-way intervention;" *i.e.,* to protect defendants from putative class members who can "opt-out" of an unfavorable decision rendered simultaneously with class certification but can choose to be bound by a favorable decision. Rule 23(b)(2) suits such as this one, from which class member cannot "opt-out," do not present the same problem. Even in (b)(2) class actions, however, "a deliberate deferral of the [class] determination until full trial on the merits * * * is fraught with serious problems of judicial economy, and of fairness to both sides." *Stastny v. Southern Bell Tel. & Tel. Co.,* 628 F.2d 267, 275 (4th Cir. 1980) (footnote omitted).

The court's delay in this case was at the expense of judicial economy. If the court had denied certification or certified a limited class before trial began, the parties and the court could have focused their energies on the narrower issues presented. Neither party, however, can claim that the delay unfairly prejudiced them. Both parties acquiesced in the decision to delay certification. The defendant thereupon fully presented its defense as to all the class and individual claims. The plaintiffs

generally proceeded on a class-wide basis as well.[7] Under these circumstances, neither party can assert prejudice from the delay.

Notwithstanding the timing of the certification decision, we find that the court abused its discretion in reaching the result that it did. The court should have certified a class consisting of the following two subclasses of blacks who were discriminated against by the bank.[8]

(1) Black employees who because of their race were denied a promotion or received lesser salary increases at the time of their promotion than did similarly situated white employees during the period January 1, 1974, to the completion of trial (the promotion class).

(2) Black persons with less than two years of experience who were discharged because of their race during the period January 1, 1974, to the completion of trial (the discharge class).

We turn first to the promotion class.

A. *The Promotion Class.*

1. *Class Certification.*

a. *Rule 23(a).*

Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites to the maintenance of a class action: (i) "numerosity"—the class must be "so numerous that joinder of all members is impracticable"; (ii) "commonality"—the presence of "questions of law or fact common to the class"; (iii) "typicality"—the claims or defenses of the

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[7] As we note, *infra*, the plaintiffs failed to fully develop evidence as to the discharge-class claims. Because of the plaintiffs' consent to the delay, it is irrelevant that this failure of proof may have been due in part to the lack of a pretrial certification decision.

[8] The plaintiffs contend that the district court also erred in failing to certify a class of black employees who were paid an initial salary rate less than similarly situated white employees. The plaintiffs made no serious effort, however, to satisfy the requirements of Rule 23 as to this class and we therefore need not discuss it on appeal.

class representative must be "typical of the claims or defenses of the class"; and (iv) a class representative that will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). The requirements must be satisfied as to each subclass. *See Stewart v. Winter,* 33 Fed. R. Serv.2d 1159, 1168-1169 (5th Cir. 1982). We find that these requirements were satisfied for the proposed class of black bank employees discriminatorily denied promotions.

(i) *Numerosity.*

As noted above, the numerosity requirement of Rule 23(a)(1) requires an inquiry into whether the class is "so numerous that joinder of all members is impracticable." A number of factors are relevant to this inquiry, the most obvious of which is, of course, the number of persons in the proposed class. No arbitrary rules regarding the necessary size of classes have been established. *Boyd v. Ozark Air Lines, Inc.,* 568 F.2d 50, 54 (8th Cir. 1977). In addition to the size of the class, the court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members. *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 1762.

The district court did not specifically address numerosity with respect to black employees who had been discriminatorily denied promotions. It stated generally:

> With regard to numerosity, there are presently 74 black employees at the bank out of a work force of 432. With the exception of intervenors Riley and Scott (who settled his case on the eve of trial), no present black employees of Union National Bank testified that the bank had discriminated against them. A number of blacks presently employed at the bank gave testimony very favorable to the bank on the issue of discrimination—Bill Pierce, Mike Mothershed, Mildred Hall, Charlotte Johnson and Shirley Clingman. There hardly appears to be any great number of blacks at the bank who desire these

> plaintiffs to represent them in a class action or who would profit from such representation. In fact very few employees purportedly subject to discrimination have been identified. When they have been identified, the basis for the discrimination charge has been exploded either by other testimony, bank records, or testimony from the alleged discriminatees themselves.

519 F.Supp. at 172.

The record simply does not support the court's statements that no present black employees testified that he or she had been discriminated against by the bank,[9] or that there are not a

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[9] The court attached considerable importance to the testimony of the six witnesses enumerated above in its finding that the bank had not discriminated against blacks in any respect. While some of these witnesses stated that they had not been discriminated against and that they had not observed that other blacks had been discriminated against, the specifics of their testimony presented a different picture and tended to support the plaintiffs' case.

Mike Mothershed testified that although a majority of the employees in the mail room have been black persons, a black has never managed the department. He stated that at least four white persons hired after him and who did the same work he did received promotions before he did and that he was paid less than the minimum salary established for the jobs that he held. He did not know until the time of trial that a white computer trainee was paid nearly as much as he, an operator with several years of experience. Although Mothershed has served as a supervisor for several years, he was never told about the bank's affirmative action plan nor given instructions as to how to evaluate employees for possible pay increases or promotions.

Mildred Hall, a black female, testified that when she went to work for the bank in 1978, her supervisor and the white employees working for her showed their resentment for her because she was a black woman taking the place of a white man. She stated that even though she has two years of college, seventeen years experience as a supervisor and an excellent work record, she has not been named an officer of the bank and has not been given an opportunity to get into the management training program. She has received raises of only four to five percent per year, considerably less than other supervisors, even though she has been told that her work is outstanding. Contrary to the district court's specific finding, Mrs. Hall did not deny that she or other black employees had been discriminated against.

(*footnote continues*)

great number of blacks who desire the plaintiffs' representation. Moreover, these findings confused the merits of the promotion class's claims with the simple question of whether the putative discriminatees were numerous enough to make their joinder impracticable.

It was the bank's stated policy to promote from within.[10] This policy was followed in a large majority of cases. During the period 1974-1979,[11] employees received 418 promotions;[12] seventy-five of the promotions went to black persons. The salary increases accompanying these promotions were larger for the white employees than for the black employees in the same salary ranges in ninety percent of the instances. More than eighty of the promotions were to supervisory or managerial positions.[13] Black employees received only two of the latter promotions. It would not be practicable to join all the black employees who received lesser promotions than their white counterparts, or no promotions at all, particularly because none of them, individually, could obtain the broad-based declaratory and injunctive relief that the class representatives sought. *See Taylor v. Jones*, 653 F.2d 1193, 1204-1205 (8th Cir. 1981); *Nance v. Union Carbide Corp.*, 540 F.2d 718, 730 (4th Cir.

(*footnote continued*)

Charlotte Johnson, a black female, employed in the bank's personnel office, testified that about one-half of all applicants for jobs with the bank are black. She could not remember if she had ever been told about the bank's affirmative action plan, but denied ever being told that the blacks hired by the bank from the special training program were high-risk employees. She was aware of the fact that there were several all-white departments in the bank, including data entry, proof control and some branch banks. She also stated that Melvin Paxton was discharged—he did not resign.

The testimony of Bill Pierce and Shirley Clingman was supportive of the bank's position.

[10] *See* note 17, *infra*.

[11] The defendants introduced two differing exhibits purporting to show the employment figures for 1980. Because of this ambiguity, we have eliminated the 1980 totals.

[12] Union National Bank defines a promotion as an employment decision that results in a change of duties closely accompanied by a salary increase.

[13] *See* Defendant's Exhibits 34(c)-34(h). Only those promotions in the highest reported salary range are included in this number.

1976), *vacated*, 431 U.S. 952 (1977); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971). Thus, the numerosity requirement was satisfied as to the promotion class. *See, e.g., Horn v. Associated Wholesale Grocers, Inc., supra*, 555 F.2d at 275-276 (41-46 class members sufficiently numerous); *Arkansas Educ. Ass'n v. Bd. of Educ., Portland Ark. Sch. Dist.*, 446 F.2d 763, 765-766 (8th Cir. 1971) (20 class members); *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (18 class members); *Colston v. Maryland Cup Corp.*, 18 FEP Cases 83, 85 (D. Md. 1978) (25 members); *Crenshaw v. Maloney*, 13 FEP Cases 154, 155 (D. Conn. 1976) (16 class members).

(ii) *Commonality.*

Rule 23(a)(2) requires that there be common questions of law or fact among the members of the class. The rule does not require that every question of law or fact be common to every member of the class, *Mosely v. General Motors Corp.*, 497 F.2d 1330, 1334 (8th Cir. 1974); *Like v. Carter*, 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972), and may be satisfied, for example, "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *American Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974).

Judge Woods wasted few words on the issue of the commonality of the promotion class, stating only: "Spann and Terry claim that they resigned from the bank because of discrimination in promotions, but the evidence fails to substantiate this charge as to them or other black bank employees." 519 F.Supp. 172.

Again, Judge Woods applied an incorrect legal standard that was improperly influenced by his view of the merits of the claims. The commonality requirement was satisfied because the following issue pervades all the class members' claims—has Union National Bank discriminated against black employees by denying them promotions and giving them lesser promotions than those given whites similarly situated? *See Chisholm v.*

United States Postal Service, 665 F.2d 482, 492 (4th Cir. 1981) Obviously, the bank's allegedly discriminatory promotion procedures will affect individual employees in different ways because of their diverse qualifications and ambitions. These factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination. *Duncan v. State of Tenn.*, 84 F.R.D. 21, 29 (M.D. Tenn. 1979).

(iii) *Typicality.*

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." This requirement is generally considered to be satisfied "if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory." C. Wright & A. Miller, *Federal Practice and Procedure* § 1764 at n.21.1 (Supp. 1982). *See Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975); *Smith v. B & O R.R.*, 473 F.Supp. 572, 581 (D. Md. 1979). *See generally* Schlei & Grossman, *Employment Discrimination Law*, 281-282 (Supp. 1979) (hereinafter cited as Schlei & Grossman).

Jerry Riley and Phyllis Mosley seek to represent the class of black persons who have been denied promotions or have been given lesser promotions on account of their race. Jerry Riley claims that he was denied a promotion to lead control clerk in the computer department, and that his promotion to computer operator trainee and computer operator were discriminatorily delayed. Phyllis Mosley alleges that she was not promoted out of her telephone clerk job because of her race. The district court did not specifically address the question of whether these claims are "typical" of the claims of the class. We find that they are.

Both Riley's and Mosley's claims rest on the same legal theory as that of the class claims; *i.e.*, that they have been subjected to "disparate treatment" in the area of promotions because of their race. Much of the evidence relevant to the individual claims, such as that relating to the subjective nature of the promotion decisions and the bank's failure to post

vacancies, will be proffered to prove the class claims as well. Typicality is not defeated because of the varied promotional opportunities at issue, or the differing qualifications of the plaintiffs and class members. *See Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977); *Doe v. First City Bancorporation of Texas, Inc.*, 81 F.R.D. 562, 569 (S.D. Tex. 1978).

The typicality requirement as customarily applied tends to merge with "commonality." *General Tel. Co. of Southwest v. Falcon*, 50 U.S.L.W. 4638, 4641 n.13 (U.S. June 14, 1982). This Court has given typicality "an independent meaning" by holding that Rule 23(a)(3) "requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff." *Donaldson v. Pillsbury Co., supra*, 554 F.2d at 830. *Accord, Wright v. Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975). *See White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971). The court must be shown that the representative is not alone in his or her dissatisfaction with the employer's unlawful practices so as "to assure that there is in fact a class needing representation." *Id.*

The burden of showing typicality is not an onerous one. It does, however, require something more than general conclusory allegations that unnamed blacks have been discriminated against.[14]

The plaintiffs have met the quantitative aspect of the typicality requirement. Several employees, in addition to Riley and Mosley, testified that they had been denied timely promotions because of their race and detailed the reasons for their complaints. The testimony of these employees—including Bobby Scott, Ralph Martin, Mildred Hall, Betty Jean Abramhamson, Mabel Johnson and Vickie Nelson—demonstrated the typicality of the plaintiffs' grievances.

(iv) *Fairly and Adequately Represent the Class.*

The district court found it unnecessary to reach the question of whether the named plaintiffs would adequately repre-

[14] Hearsay testimony may be admitted to demonstrate typicality. *See Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830-831 n.3 (8th Cir. 1977).

sent the promotion class, because of its determination that their proof failed to delineate any class who should be represented. Because we have held to the contrary, we briefly address this requirement.

The focus on Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel. *Gonzales v. Cassidy,* 474 F.2d 67, 72 (6th Cir. 1973). *See generally* Schlei and Grossman, *supra,* at 283.

Phyllis Mosley and Jerry Riley allege that they have been denied promotions within the bank on account of their race. They share the class' interest in procuring declaratory and injunctive relief to eradicate those aspects of the bank's promotion practices that operate to keep blacks in the lower-level positions in the bank. There is no indication that their interest in procuring their rightful place in the bank's hierarchy will be at the expense of other class members or will, in any other way, be antagonistic to the class' interests. Finally, they have demonstrated a willingness to prosecute the interests of the class through qualified counsel. Mosley and Riley will, therefore, fairly and adequately represent the promotion class.

b. *Rule 23(b)(2).*

For the reasons set forth above, we find that the appellants satisfied the requirements of Rule 23(a) in regard to the promotion class. We must still inquire, however, whether that action is maintainable under any of the subdivisions of Rule 23(b).

The appellants moved to certify this action under 23(b)(2). Rule 23(b)(2) provides:

> (b) * * * An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

We have held that Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer "on [the] grounds generally applicable to the class." *United States Fidelity & Guar. Co. v. Lord,* 585 F.2d 860, 875 (8th Cir. 1978), *cert. denied,* 440 U.S. 913 (1979). Racial discrimination is such a ground; this case seeking injunctive relief against class-wide race discrimination in the bank's promotion practices was appropriately brought under 23(b)(2). *See id.* at 875; *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 257 (5th Cir. 1974). The fact that back pay was sought incidentally to the prayer for injunctive relief does not affect this result. *E.g., United States Fidelity & Guar. Co. v. Lord, supra,* 585 F.2d at 875; *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.), *cert. denied,* 429 U.S. 870 (1976); *Jones v. Diamond,* 519 F.2d 1090, 1100 (5th Cir. 1975).

2. *Merits of the Promotion Class Claims.*

After a careful review of the 6,000 page transcript and the 150 exhibits comprising this record on appeal, we are left with the firm conviction that the district court erred in holding that the bank did not discriminate against black employees with respect to promotions. *See United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). The bank must be given credit for its adoption in the early 1970's of an affirmative action program designed to end discrimination against black applicants and employees. It must also be credited for its implementation of that policy with respect to hirings and some other aspects of the employment relationship. The fact is, however, that the affirmative action policy has not been implemented with respect to the promotion process, and discrimination continues in this area.

No single reason for this failure appears from the record; it is rather a combination of factors. White supervisors make

most promotional decisions and the criteria for promotions are primarily subjective in nature.[15] The affirmative action program has not been effectively communicated to all supervisors and adherence to that policy is not required by top management. Vacancies are not posted. The system recently adopted to communicate vacancies to employees is incomplete and untimely.[16] Acts of racism in the bank are not always dealt with firmly and fairly.

The plaintiffs established a strong prima facie case of racial discrimination with respect to promotions by showing a history of discrimination by the bank; by introducing evidence with respect to each of the factors outlined above; by presenting evidence of individual instances of discrimination; and by detailing statistical evidence which tended to show that qualified black employees were not promoted in even rough parity to their numbers in the promotional pool—*employees currently employed in the bank.*

The bank's primary defense is that the relevant labor market for promotees was the Little Rock area and not the employees within the bank itself. It demonstrated that it had not only hired blacks in accordance with their representation in the general population, but that it hired them for jobs at all levels in accordance with their representation in similar skill levels in the area. The district court accepted this defense.

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[15] Promotional procedures wherein white supervisors make the promotional decisions on the basis of largely subjective criteria must be closely scrutinized because of their susceptability to discriminatory abuse. *See Coble v. Hot Springs School Dist.*, 29 FEP Cases 201, 205 (8th Cir. 1982); *Royal v. Missouri Highway & Transp. Comm'n*, 655 F.2d 159, 164 (8th Cir. 1981); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 240-241 (5th Cir. 1974); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1383 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

[16] Bank employees have traditionally learned of vacancies by word of mouth. In April, 1979, the bank began publishing notices of vacancies in its newsletter. All vacancies have not been included, however, and the notices sometimes appeared after the vacancy had already been filled. The notices often excluded such information as the qualifications necessary to fill the position or the salary range for the job.

In our view, the district court clearly erred in so doing. The bank's stated policy was and is to promote from within and to give effect to its affirmative action program in the process.[17] Promotion from within was followed in practice. The record shows that the bank filled more than seventy-five percent of above-entry level positions, and over fifty percent of the highest level managerial and technical positions, in this manner. Under these circumstances, it was error to use general population statistics as the basic criteria for determining whether an inference of discrimination arose from the representation of blacks at various levels in the bank's work force. *See Mayor of The City of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620-621 (1974); *Rivera v. City of Wichita Falls,* 665 F.2d 531, 541 n.16 (5th Cir. 1982); *Fisher v. Proctor & Gamble Mfg. Co.,* 613 F.2d 527, 543-544 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981).

When the proper labor market is considered, the statistical evidence is sufficient to raise an inference of discrimination.

At the time of trial, all but one of the twenty-five vice presidents and assistant vice presidents were white. All division heads were white, as were fifty-four of the fifty-six persons having hiring or firing authority at the bank. Seventy-seven of the eighty bank officers were white, and twelve of the thirteen branch banks were managed by white employees. No black employee was promoted to the position of teller until after this

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[17] The bank's Personnel Policy Manual states:

Promotion Criteria

The Bank policy on filling openings is to do so from within where possible. This may be from within the department where the opening exists or by transfer from another department.

The decision to promote is based on many factors. These include, but are not necessarily limited to, performance in present position, specialized skills and background, preparation by the individual for assumption of additional responsibilities, AIB courses completed, in-house training completed, etc. Seniority is to be used as a factor only if two candidates are considered equally qualified in all other respects.

In every promotion decision, the Bank's Affirmative Action Programs will be considered.

action was commenced and only one black had been appointed a senior teller by the time the trial occurred.[18]

Blacks received only a handful of promotions in the three highest paid salary ranges. In 1974, thirty white employees and one black employee received promotions in the three highest paid salary ranges. In 1975, seventeen whites and two blacks received promotions in these categories and in 1976, twenty-nine whites and one black did so. In 1977, the figure was twenty-four whites and six blacks and in 1978, forty-nine whites and eight blacks. In 1979, twenty whites and one black received promotions in these categories. Cumulatively, 169 white employees received promotions in the three highest salary ranges and only nineteen black employees received similar promotions.[19] Thus, over the five year period, black employees received only eleven percent of the promotions to these positions even though their numbers in the work force, their years of experience with the bank and their educational levels indicate that more would have been promoted had the process been free of discrimination. In fact, black employees made little or no progress in being appointed to professional, technical, managerial or administrative positions in the period 1974-1979. The bank employed one person in the technical category in 1974 and only one in 1979, and it employed one in the managerial category in 1974 and only two in 1979.

Apart from the history of discrimination, the reliance on subjective criteria in the discretion of white supervisors, and the

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[18] The bank's experience with tellers illustrates the fact that the paucity of black promotees can not be attributed to low turnover in the bank. Sixteen black persons were appointed to teller positions between the commencement of this action and the completion of trial. The turnover rate among bank employees in all but the highest pay categories approximated forty per cent from 1974-1980.

[19] It appears that the only classes of employees in the highest salary range were professional and technical employees, managers and administrators. Thus, 104 promotions were to middle-level positions through the period 1974-1980. Even if it is assumed that no black *employees* were qualified to fill the positions in the highest salary range—an assumption which is not supported by the record—the fact remains that black employees were clearly qualified by education and experience to fill most positions in the second and third highest salary ranges. These two ranges included almost all of the middle-level supervisory positions and many first-level supervisors.

substantial disparity between black employees available within the bank and the proportion actually promoted, there is further evidence of discrimination in salary increases awarded in connection with promotions. Many promotions involve relatively minor changes in title or job description, accompanied by salary increases within specified ranges. In over ninety percent of the cases, black employees received smaller increases than white employees when promoted within the same salary ranges.[20] The extent to which white employees' salary increases exceeded those of black employees is as set forth below:

Year	Dollar Amount Per Month in Excess	Cumulative Per Month Dollar Amount in Excess	Annual Percentage in Excess
1974	17.94		36
1975	(2.96)	14.98	(5)
1976	8.80	23.78	16
1977	11.00	35.14	18
1978	25.53	60.67	54
1979	18.45	79.12	26

As indicated above, the cumulative effect of the smaller raises given to black persons each year was that the portion of black employees' wages resulting from promotion salary increases, on the average, lagged almost $80 behind the same figure for their white counterparts.

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[20] The bank's expert witness, Dr. James Gwartney, applied a "regression analysis" to the earnings of each employee of the bank as of a specific date and concluded that the differences in salary levels between black and white employees could be explained on the basis of differences in education, seniority, full-time versus part-time work, computer experience, *bank management experience* and other management experience. The bank management factor was said by Dr. Gwartney to account for $83.44 per month of the salary differentials. To the extent the analysis included this factor, it reflected, rather than explained away, discrimination by the bank in its promotion decisions.

Dr. Gwartney did not analyze the salary increases granted to employees who were promoted over the period 1974-1979. Thus, his testimony did not explain the disparity in salary increases accompanying promotions given to similarly situated black and white employees.

The bank's alternative line of defense was the vague assertion that black employees as a whole within the bank were not as qualified as the white employees. This is not supported by the record. On the contrary, the record shows that these two groups' qualifications were substantially equal when measured by two key objective criteria: the black employees had as much experience as the white employees, and their educational level averaged 13.1 years, as compared to 13.5 years for the whites.

Little else is offered by the bank to explain the promotional disparities. Unlike the defense to the discharge class' claims, the bank for the most part did not offer specific nondiscriminatory reasons for its failure to promote specific black employees. In those few instances where the bank did attempt to offer specific nondiscriminatory reasons, the explanations were often inconsistent and contradictory. If a black person had more education than the white person receiving a promotion, the bank claimed that it made its selection on the basis of experience. Conversely, if a black employee had more experience than the white promoted, the bank claimed that education was the key to performing that job. And if the black employee had more experience and a better education, the bank often simply stated that the white employee was better qualified without giving a reason for the decision. This set of ad hoc, contradictory and conflicting explanations does not even begin to explain the broad pattern of promotional discrimination as a whole, much less is it convincing as to the relatively few instances in which it was proffered. Moreover, no explanation whatsoever was proffered to justify the salary discrimination between blacks and whites who were promoted within the same salary ranges.

The overriding facts are that black employees were not promoted to positions for which they were qualified and when they were promoted, they consistently received salary increases significantly less than comparable white employees. Thus, the plaintiffs' proof as a whole not only stated a prima facie case, but also carried the ultimate burden of proof as against the bank's limited attempt at an alternative explanation. The only conclusion which is reasonable on this record is that the bank

discriminated on the basis of race in making promotions during the period up to the time of this action.

B. *The Discharge Class.*

1. *Class Certification.*

We find that the plaintiffs satisfied the requirements of Rule 23(a) and 23(b)(2) with regard to the discharge class. We will address this issue only briefly, however, because of our holding, *infra,* that although this class should have been certified, there was insufficient proof of class-wide discrimination against the discharged black employees.

The class of black employees discriminatorily discharged from the bank was sufficiently numerous to make joinder impracticable. Fifty-three blacks were discharged during the period 1974-1980. The record shows that they were discharged at a rate twice that of the white dischargees. The class claims have a common question of law and fact—that is, were the blacks discharged because of their race? Phyllis Mosley's allegation that she was discharged from her telephone clerk position on account of her race is typical of the claims of the discharge class. Mosley has also shown that she is not alone in her dissatisfaction with the bank's racially discriminatory practices. Two persons besides herself, Melvin Paxton and Harold Brown, testified that they had been actually or constructively discharged from their positions because of their race. This was coupled with evidence that several of the blacks who were discharged for cause were granted unemployment compensation benefits after hearing.[21]

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[21] Discharged employees may be denied unemployment compensation benefits under Arkansas law if they were discharged for "misconduct." Misconduct is something more than "cause," and has been variously defined by the Arkansas courts as "a disregard of standards of behavior which the employer has a right to expect," *Parker v. Ramada Inn,* 264 Ark. 472, 572 S.W.2d 409, 411 (1978), or "an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations." *Willis Johnson Co. v. Daniels,* 269 Ark. 795, 601 S.W.2d 890, 893 (Ct. App. 1980). Because Union National Bank is free to lawfully discharge its black employees for reasons that do not amount to "misconduct" within the meaning of

(*footnote continues*)

Further, Mosley has shown that she can fairly and adequately represent the class of black dischargees. Her claim rests on the same "disparate treatment" theory that underlies the class claims. She has shown a willingness to prosecute this action through qualified counsel to vindicate her personal interests and those of the class.

Finally, the discharge class' claims were properly brought under Rule 23(b)(2) to seek declaratory and injunctive relief to prevent further class-wide discriminatory discharges. The district court should have certified a class of black persons discriminatorily discharged from the bank.

2. *Merits of the Discharged Class Claims.*

The plaintiffs established a prima facie case of racial discrimination regarding the bank's discharge of black employees. They did so by proving a history of discrimination in the bank's employment practices, by introducing statistical evidence that showed that blacks with less than two years of service were discharged at more than twice the rate of white employees in the same group[22] and by proving that Phyllis

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(*footnote continued*)

Arkansas's unemployment compensation law, as long as the reasons do not relate to race, we have not considered the unemployment compensation awards as evidence on the merits of the discharge class' claims. We believe, however, that the fact that a significant proportion of the discharged blacks filed for and received these claims is probative of the likelihood that a number of those blacks felt aggrieved, on racial grounds, by the bank's discharge practices. *Cf. White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971).

[22] We find no support in the record for the district court's observation that more black employees in the target group were discharged than white employees because the black persons hired were less qualified than their white counterparts. The defendant's expert witness testified that the higher discharge rate for black employees could be explained on one of two theories: (1) that the bank did not apply the same discharge standards to whites that it did to blacks and thus discriminated against the latter group; or (2) that the bank hired high-risk black employees from employment pools or training programs who had little work experience and could not be expected to pan out as well as the white employees. He declined to adopt either theory as his own and said that it was up to the court "to look at [the] discrimination data on an individual-by-an-individual basis and see whether or not the discharge was or was not justified."

Mosley was discharged on account of her race. *See Taylor v. Teletype Corp.*, 648 F.2d 1129, 1135 (8th Cir.), *cert. denied*, 102 S.Ct. 515 (1981).

The plaintiffs' prima facie case was rebutted by the defendant. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Locke v. Kansas City Power and Light Co.*, 660 F.2d 359, 365 (8th Cir. 1981); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1254 (8th Cir. 1981). The bank articulated a reason for each and every discharge of a black employee by introducing employment records which listed the reason why each employee with less than two years of service had been discharged. The reasons were varied. They included dishonesty, excessive overdrafts, absenteeism, inefficiency and tardiness.

It was then incumbent on the plaintiffs and intervenors to prove that the given reasons were pretextual in at least enough instances that the court could find a pattern and practice of racial discrimination against blacks in the discharge class. They failed to do so with respect to any dischargee other than Phyllis Mosley. Indeed, they did not attempt to rebut the articulated reason with respect to any black employees other than the named plaintiffs or intervenors. Thus, they failed to meet their burden of persuading the court that the class of blacks discharged by the bank had, in fact, been discriminated against on account of their race.

C. *Individual Claims.*

1. *Jerry Riley.*

The district court concluded that there was no credible evidence that Jerry Riley was subjected to racial discrimination with respect to promotions and salary increases. Although there is insufficient evidence from which to conclude that Riley was discriminated against in terms of salary increases, the district court erred in concluding that Riley had not been the victim of a racially motivated promotion decision.

Riley graduated from Pine Bluff High School in 1976, and was hired by the bank shortly thereafter. He pursued his education throughout his tenure at the bank. At the time of

trial, he was a junior at the University of Arkansas at Little Rock (UALR), and had completed almost eighty credit hours of business-related courses.

Riley's first job at the bank was that of messenger in the mail room. He was paid $400 a month. There were three black clerks in the mail room and one white clerk. The mail room was supervised by a white.

Riley quit his mail-room job on December 31, 1976. On July 1, 1977, he was rehired for the same job at a monthly salary of $425. Six weeks later, Riley requested a transfer out of the mail room. He remained a messenger, however, until November 7, 1977, when he was promoted to "control clerk" in the computer department of the bank. He held that position until March 15, 1980; he then became a computer operator trainee. He still held that position when the trial began.

Riley contends that: (1) he was discriminatorily passed over for a promotion to "lead control clerk" in July, 1979, in favor of Gina White, a white woman; and (2) the bank delayed his advancement to computer operator trainee and computer operator on account of his race. We first address the "lead control clerk" controversy.

In July, 1979, Gina White, a control clerk in the bank's computer department, was promoted to the position of lead control clerk. The lead control clerk does essentially the same work as the control clerk, but has the additional duties of training the other clerks and assuming their functions when one of them was away from their job.

Riley was qualified to be the lead control clerk. He had two years of control clerk experience at the time the position opened. On April 20, 1979, only three months before the supervisor vacancy occurred, Riley's supervisor characterized Riley as "a loyal employee who is always eager to learn new things. He is good at his job and doesn't mind helping others. He doesn't mind working overtime when we need help or are in a jam."

Furthermore, Riley's employer was sufficiently on notice that Riley would likely be interested in the lead control job.

Riley had expressed to Ray Whittier, the computer center manager, his desire to advance in the bank, specifically in the computer center. The lead control clerk position would be a logical advancement for Riley. In light of Riley's unrefuted testimony that the vacancy was not posted and that he did not, through other means, learn of the vacancy until after it had been filled, we cannot hold that Riley's prima facie case was defeated because he did not formally "apply" for the lead control job.

Finally, Riley's prima facie case of racial discrimination was complete when evidence was introduced showing that Gina White, a person outside the protected group at issue, received the lead control clerk position. *See Freeman v. Lewis*, 675 F.2d 398, 401 (D.C. Cir. 1982). The burden then shifted to UNB to articulate a legitimate, nondiscriminatory reason for its failure to promote Riley to lead control clerk. *See Texas Dep't of Community Affairs v. Burdine, supra*, 450 U.S. at 254; *Locke v. Kansas City Power and Light Co., supra*, 660 F.2d at 365; *Johnson v. Bunny Bread Co., supra*, 646 F.2d at 1254.

Neither the district court's opinion nor the defendant's brief on appeal identified a legitimate, nondiscriminatory reason for the failure to promote Riley. We assume from our reading of the record that Raymond Whittier's testimony regarding the lead control clerk opening constituted the bank's defense to Riley's prima facie case. Whittier advanced two reasons for the decision: (1) White was more qualified, and (2) White had more experience in the control functions of the division.

Because the UNB "articulated a legitimate, nondiscriminatory reason" for failing to promote Riley, it was incumbent on Riley to show that the proffered reason was in fact a "pretext" for a racially motivated employment decision. Again, the defendant's briefs and the district court's opinion are silent as to Riley's evidence of pretext. Our task of review is complicated by the district court's failure to specifically address in any way the lead control clerk promotion issue. The district court merely noted that that claim was the basis of Riley's November, 1979, EEOC charge. We have chosen, however, to treat the court's

general conclusion—that Riley did not suffer "racial discrimination at this bank as far as promotions * * * are concerned"—as its finding of fact on this specific issue. 519 F.Supp. at 170. We have done so because even if we afford that "finding" the deference an appellate court must give to the district court's findings of fact, it cannot stand.

We cannot give credence to the bank's contention that White was better qualified. Riley had more experience in the division, he was better educated and he had a good work record. The witness testifying that White was better qualified gave no reason for this conclusion; this conclusion was completely subjective. Nor can we give credence to the claim that the job involved more control work than distribution work.[23] The record does not support the claim. Moreover, Gina White could not perform all the tasks required of the lead control clerk. We thus conclude that the bank's failure to promote Riley—an experienced, favorably rated control clerk—was racially motivated.

Jerry Riley also claims that the bank discriminatorily delayed his advancement to computer operator trainee and computer operator. We find that Riley failed to prove these claims.

In December, 1979, Ray Whittier offered Riley a job as computer operator trainee. The promotion was to be effective as soon as Riley could train someone to replace him as control clerk. Whittier had difficulty finding someone acceptable for the control clerk job, so Riley did not assume his trainee status until March, 1980.

Riley claims that he should have been promoted to computer operator trainee as early as May, 1979,[24] and that he

[23] Riley testified to the contrary. We note that Riley's testimony was before Judge Eisele. We are thus free to independently judge the credibility of this testimony because Judge Woods, like us, did not observe the witness but only reviewed the transcript. *See Johnson v. Mabry*, 602 F.2d 167, 170-171 (8th Cir. 1979). We find Riley's statements credible.

[24] The district court characterized Riley's claim as being much broader involving all persons hired as computer operators after August, 1977. The district court clearly erred in doing so.

was damaged as a result of the delay. At that time, Bobby Scott was fired from his trainee job, and Riley expressed an interest in replacing Scott. The job was given to David New, a white person with no prior experience with the bank.

Riley has proved a prima facie case of racial discrimination regarding the bank's failure to promote him to the May, 1979, trainee vacancy. He was qualified for the position. It was not necessary that the trainee have experience as a computer operator, as was demonstrated by the bank's decision to hire New, who had no such experience. In May, 1979, as in December, 1979, Riley had accumulated a significant amount of experience at the bank and was generally viewed as a competent computer center employee.

Riley's prima facie case was rebutted by the bank, however. Whittier testified that New was hired because he was a computer science major at the UALR and had completed a number of computer science courses in pursuit of his degree.

Riley did not show that the bank's "articulated nondiscriminatory reason" for hiring New instead of himself was a pretext for racial discrimination. During the period 1977-1980, the bank consistently hired or promoted persons into the computer jobs who had actual operator experience or who had progressed significantly toward computer science degrees. The record reveals only one exception to this: Riley, who was given a trainee job even though he had no computer operator experience and was not taking computer courses at UALR. Thus, we are not faced with the flaw in the bank's general rebuttal to the promotion class claims, where varying, inconsistent rationales have purportedly underlain the bank's promotion decisions. Riley acknowledged at trial that taking computer science courses at UALR "would allow someone to move faster in data processing at the bank." We conclude that the bank's proffered rationale for hiring New over Riley, based on a consistently applied preference for persons who have a demonstrated interest in computer science, was not shown to be pretextual.

Riley also claims that he should have been promoted from trainee to computer operator sooner than he was. At least one

operator vacancy occurred between June, 1980, when Riley alleges he was qualified to assume full operator status, and September, 1980, when he was promoted. That vacancy was filled by a white person.

In our view, Riley has failed to prove that the length of his training period was the product of racial discrimination. On this record, we cannot find that Riley was qualified to become an operator at some point sooner than he did. The bank introduced a memorandum dated July 11, 1980, three months after Riley became a trainee, that outlined various deficiencies in Riley's performance at that time. Whittier testified that in July, 1980, when the operator vacancy occurred, Riley's supervisors felt that he was not ready to assume that responsibility because there were various operator functions that Riley could not yet perform.

Riley does not seriously dispute that his training was incomplete at that time, but argues that this fact was not his fault, that the supervisors did not give him the time and assistance at the computer console necessary to complete his training. Riley and Whittier testified, however, that the night shift had always been the busiest time for the computer operators, so that they had little time to supervise and assist a trainee's work at the console. Because of this, Whittier suggested that Riley work day-shift hours to facilitate his training, as did Chuck Howland, a white employee training at about the same time. Riley refused to switch his hours because that would interfer with his college schedule. Thus, we are unable on this record to attribute the problems of Riley's six-month training to racial discrimination by the bank.

2. *Phyllis Mosley.*

In our view, the trial court's specific finding that race played no part in Phyllis Mosley's termination is clearly erroneous. Its implicit finding that race played no part in the bank's failure to promote her is equally erroneous.

Mosley, a high school graduate—with one-half year of college—was employed by the bank as a file clerk on August 1, 1977, at a salary of $425 per month. She was transferred to the

position of telephone clerk on August 21, 1977. Four of the seven file clerks were black. Four of the five telephone operators were black. The supervisors of the departments during Mosley's tenure were white.

Mosley was a good employee. She received salary increases on October 16, 1977, January 1, 1978, April 1, 1978, and March 16, 1979. She consistently worked more overtime than other employees—black or white. Notwithstanding Mosley's record, white employees who were hired after her were promoted out of the department in which she was employed to better jobs. A white woman, who came into the department after Mosley, was made supervisor of the department shortly after Mosley was terminated.

On March 29, 1979, Mosley reported to work before 8:00 a.m. Three other employees in the department, including at least two white employees, left the job before 5:00 p.m. Mosley told her supervisor that she had to leave at 5:30 p.m. to catch a bus to her home—some sixteen miles from Little Rock. Mosley stated that she had no alternative way to get home and left at 5:30 p.m.

Mosley was then told that she had to work overtime whenever she was requested to and that failure to do so would be considered insubordination. She complained about the unfairness of the overtime distribution.

On April 2, 1979, Mosley again reported to work before 8:00 a.m. During the day, she went to Personnel Director Zegler's office and talked to him about being promoted to supervisor of her department. Sometime in the afternoon, she was again told that she would have to work after 5:30 p.m. By the time she was told, it was too late for her to make other arrangements. At least three white employees of the department left at the regular quitting time, 4:30 p.m.; one other white employee left at 5:05 p.m. Mosley left at 5:30 p.m., after being warned that she would be discharged if she did. She was discharged. No reason was advanced at trial as to why the overtime was not fairly distributed or why the white employees were permitted to go home at the regular quitting time while Mosley, who had previously worked more overtime than the

white employees, had to work after 5:30 p.m. Further, Mosley's summary termination was in violation of the bank's disciplinary policy as set out in its Personnel Policy Manual.[25]

Mosley established a prima facie case with respect to her discharge. Her work record, her record of working overtime and the statistical evidence with respect to the discharge of black employees with less than two years service, are more than sufficient in this regard.

The bank did articulate a specific reason for Mosley's discharge, but in our view, Mosley introduced more than sufficient evidence to show that the reason was pretextual.

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[25] The district court found:

> The bank has a discipline policy which is spelled out in its personnel policy manual and in its supervisor course. If an employee's performance is not satisfactory, the supervisor first advises the employee orally. If the sub-par performance continues, the employee is advised in writing of the specific criticism. If this does not work, a plan for improvement is instituted in which the supervisor and employee sit down, discuss the problem and what steps are needed to correct it. The next step, called a notice of disciplinary probation, involves a formal notice in writing of the need to correct the employee's deficiency. This notice is discussed personally with the employee and is signed by him. At this point the employee is placed on probation and given a specified number of days, usually between thirty and ninety, to take corrective action. If all these measures have failed, dismissal is considered. There are nine division heads, fifty-six department heads and sixty-nine supervisors in the bank. If there is a flagrant offense, the supervisor is authorized to terminate an employee on the spot. A flagrant offense is described by the bank's personnel director as theft, fighting, threatening a customer, refusing to follow a reasonable order or something of a similar nature. Otherwise, the decision to discharge is made only by the personnel director, the division manager and the department head in joint consultation. In the event of a disagreement, the final decision to terminate is made by the personnel director, who can be overruled only by the executive vice president. The written memoranda with respect to discipline goes into the employee's personnel file.

519 F.Supp. at 146.

Mosley was not only a good employee, she insisted that she be treated fairly. She worked hard and asked to be promoted; she complained when racial slurs were directed at her[26] or at blacks generally, and finally complained that overtime was not being distributed fairly. Notwithstanding her work record and requests, the defendant made no effort to accommodate her need to catch her bus at 5:30 p.m., even though they accommodated others and let some employees go home at the regular 4:30 p.m. time. No other employee of the bank had been discharged for failing to work overtime, and the handbook does not make such an offense a dischargeable one.

Mosley also established a prima facie case with respect to her promotion claim. Her education, experience and work record all qualified her for promotion. She requested that she be promoted; and not only were her requests denied, but white employees with less experience were given the promotions or white persons with no experience in the bank were hired off the street for the jobs to which she aspired. The defendant failed to articulate reasons for Mosley being passed over other than to repeat the general statement that it was their practice to hire the best qualified person. No specific evidence was offered to support this contention, and Mosley's evidence was sufficient to prove it to be pretextual.

Certainly, Union National Bank has a right to insist that blacks, as well as whites, obey direct orders, but they also have an obligation to treat blacks fairly in the distribution of overtime and with respect to promotional opportunities. Here, the record as a whole leads to only one conclusion, and that is that Mosley was discharged[27] and denied promotions because of her race.

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[26] Mosley testified that she was subjected to racial slurs on at least two occasions and was victimized by being given a copy of an offensively worded "Nigger" application. She complained to management about the slurs and received an apology from an offending white employee on one of the occasions.

[27] Mosley made application for unemployment compensation benefits; the bank protested. The Arkansas Employment Security Board held that Mosley was entitled to benefits.

3. *Melvin Paxton.*

On April 12, 1976, Melvin Paxton filed a charge with the EEOC, alleging that he had been hired as a management trainee and that he should have been paid the same salary as other white trainees—$600 per month. He was paid considerably less than that sum. Shortly after the charge was filed, Paxton was called into the office of Zegler, the personnel director, and questioned at great length as to the reasons for his filing the charge and his dissatisfaction with the bank. The interrogation upset Paxton and he resigned on the spot. The trial court found that Paxton was not a management trainee. It characterized him as an unsatisfactory employee with an extremely bad work record. It found that Paxton had not been either actually or constructively discharged.

While we do not believe that the record supports the view that Paxton was an unsatisfactory employee and while we believe that a factfinder could have found that Paxton was constructively discharged, we are unable to say that the trial court's finding with respect to the alleged discharge is clearly erroneous. We likewise hold that the trial court's finding that Paxton was not hired as a management trainee was not clearly erroneous.

We do, however, hold that Zegler's intensive interrogation of Paxton as to why he filed a charge of discrimination with the EEOC was violative of 42 U.S.C. § 2000e-3, and that the bank should be enjoined from such activities in the future.

4. *Katrina Terry, George Spann and Harold Dominic Brown.*

The trial court's findings that Terry, a black female, and Spann, a black male, were neither denied promotions nor discharged for reasons relating to their race were not clearly erroneous. The trial court's findings that Harold Brown, a black male, was discharged for reasons unrelated to his race were not clearly erroneous.

D. *Relief.*

1. *Class Relief.*

Title VII has vested broad equitable powers in the federal courts to fashion a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[28] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Firefighters Inst. v. City of St. Louis, Mo.*, 588 F.2d 235, 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979). To the end that a proper decree be fashioned, we remand the matter to the district court with directions to it to give the plaintiffs an opportunity to prove the extent to which class members were damaged by their being denied promotions on account of their race, to award class members who were denied promotions the monetary damages they have sustained and to provide for their promotion to the first vacancy that occurs in a position for which they are qualified. *See Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 443-444 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974). The district court is also directed to fashion a decree which will insure that race will not be a factor in future promotional decisions by the bank. The court shall require that at least the following practices be instituted:

The bank shall develop job descriptions for all positions other than entry-level ones. The descriptions shall be in writing and shall set forth the general requirements and responsibilities for the position as well as any specific skills that are required, salary ranges for the position and any other lawful employment criteria utilized by the bank. *See Patterson v. American Tobacco Co.*, 535 F.2d 257, 273 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

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[28] 42 U.S.C. § 2000e-5(g) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate. * * Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

The bank shall develop standards for selection to each affected position. These standards, based upon a job analysis, shall be to the extent possible, "reasonably objective" in nature and job related. *See Muller v. United States Steel Corp.*, 509 F.2d 923, 927-928 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Baxter v. Savannah Sugar Refining Corp., supra*, 495 F.2d at 441; *United States v. N. L. Industries. Inc.*, 479 F.2d 354, 377 (8th Cir. 1973).

To the extent that the personnel director of the bank relies upon recommendations of supervisory personnel in selecting persons for non-entry level positions, the recommendations shall be in writing and shall be in accordance with written guidelines. *See Stewart v. General Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Patterson v. American Tobacco Co., supra*, 535 F.2d at 273; *Brown v. Gaston County Dyeing Mach. Co., supra*, 457 F.2d at 1383.

The bank's practice of limiting employees considered for bank officer positions to *only* those recommended by division heads shall be discontinued. Employees shall be given an opportunity to initiate requests for promotions. *See Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1193-1194 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

The bank shall be required to post timely notices of all non-entry level job vacancies in a conspicuous place in the bank. Such notice shall contain a reasonably specific description of the position to be filled, the responsibilities involved, the qualifications required, the salary range for the position and the procedure for applying for the position. *See Senter v. General Motors Corp., supra*, 532 F.2d at 529; *Rowe v. General Motors Corp., supra*, 457 F.2d at 360-361; *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 458 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

Any information regarding an employee's performance, including periodic ratings, supervisory recommendations, productivity records, discipline records, attendance records and other information relating to her or his employment at the bank shall be made available to the employee upon her or his request.

The bank shall develop procedures for promptly resolving disputes with respect to promotions comparable to the system mandated by the Court in *Alexander v. Aero Lodge No. 735, Intern. Ass'n, Etc.*, 565 F.2d 1364, 1386-1387 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978).

The bank shall develop standards to insure that black employees being promoted will receive salary increases equivalent to comparably situated white employees.

The injunctive relief outlined above may not be sufficient to insure that the bank's practice of discriminating against blacks with respect to promotions will be eliminated. It may be necessary to order the bank to meet reasonable goals in this regard. *See Chisholm v. United States Postal Services, supra*, 665 F.2d at 498-499; *Firefighters Inst. v. City of St. Louis, Mo., supra*, 588 F.2d at 239. We feel that the district court should make this decision after the parties have been given an opportunity to be heard on it.

We finally direct that a decree be fashioned which will enjoin the bank from intimidating or otherwise harassing employees who have filed charges with the EEOC.

2. *Individual Relief.*

Phyllis Mosley is entitled to be reinstated to the position she previously held, *see Danner v. Phillips Petroleum Co., supra*, 447 F.2d at 163; *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), and given back pay, *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 418. Mosley's award should be determined by measuring the difference between actual earnings for the relevant time period and those which she would have earned absent the unlawful discrimination by the defendant. The latter calculation would include back pay from the date of discharge to the present and any increases she would have received within that period. *See Satty v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975), *aff'd in part and vacated in part on other grounds*, 434 U.S. 136 (1977). *See also Golay & Co. v. N.L.R.B.*, 447 F.2d 290, 294 (7th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972). Mosley is also entitled to receive as part of her back pay award any fringe

benefits she would have received had she remained employed by Union National Bank. *Pettway v. American Case Iron Pipe Co., supra,* 494 F.2d at 263; *Bowe v. Colgate, Palmolive Co.,* 489 F.2d 896, 903 (7th Cir. 1973).

Once the gross amount of back pay owed Mosley has been determined, the burden shifts to Union National Bank to prove what should be deducted from that award as "[i]nterim earnings or amounts earnable with reasonable diligence." 42 U.S.C. § 2000e-5(g).

In light of our earlier finding that Mosley was denied promotions on account of race in violation of Title VII, she is entitled to receive compensation for wages lost as a result of the failure of the bank to promote her to the position of supervisor of her department. *See Patterson v. American Tobacco Co., supra,* 535 F.2d at 269; *Berio v. EEOC,* 19 FEP Cases 168, 169 (D.C. Cir. 1979); *Chisholm v. United States Postal Service,* 516 F.Supp. 810, 878 (W.D. N.C. 1980), *aff'd,* 665 F.2d 482 (4th Cir. 1981). She is also entitled to "recover in the future the rate of pay of the position * * * [s]he was denied until [s]he is placed in a job of equal or higher pay grade." *Chisholm v. United States Postal Service, supra,* 516 F.Supp. at 878-879, citing *Patterson v. American Tobacco Co., supra,* 535 F.2d at 269. She is moreover to be promoted to the first vacancy that she is qualified to fill. *Chisholm v. United States Postal Service, supra,* 516 F.Supp. at 879.

Similarly, Jerry Riley is entitled to compensation lost as a result of the bank's discriminatory failure to promote him to lead control clerk in July, 1979. In determining this amount, the court must also consider the effect this decision had on Riley's wages not only while he continued to be a control clerk but after he was promoted to trainee and computer operator as well. Ray Whittier testified that the salary received by an employee prior to a promotion is an important consideration in setting the minimum salary for the new position. Thus, the bank's failure to promote Riley to lead control clerk and accordingly raise his salary may have had a continuing depressive effect on his subsequent salary schedule and that must be taken into account by the district court on remand.

Costs shall be taxed to the appellee. The appellants and intervenors shall submit to this Court a verified request for attorneys' fees for this appeal together with all data necessary to support the request within thirty days of the entry of this order. The appellees shall have ten days thereafter to submit objections, if any, that it may have to appellants' and intervenors' request.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE
United States District Court
E. D. Arkansas, W. D.

Nos. LR-76-C-110, LR-C-78-330 and LR-C-76-239

MELVIN PAXTON, JR.,
Plaintiff,

v.

UNION NATIONAL BANK, A Corporation,
Defendant,

KATRINA TERRY, PHYLLIS MOSLEY, JERRY RILEY AND GEORGE SPANN, Intervenors.

HAROLD DOMINIC BROWN,
Plaintiff,

v.

UNION NATIONAL BANK OF LITTLE ROCK,
Defendant.

NORMAN WILLIAMS,
Plaintiff,

v.

UNION NATIONAL BANK, A CORPORATION,
Defendant.

May 26, 1981

MEMORANDUM OPINION

HENRY WOODS, District Judge.

Melvin Paxton filed an individual and a Rule 23 class action suit against the Union National Bank on April 12, 1976 (LR-76-C-110). Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343(4), 2201 and 2202 and 42 U.S.C. §§ 1981 and

2000e-5(f). The latter sections are part of Title VII of the Civil Rights Act of 1964. The complaint charged that the bank had discriminated against plaintiff and the class he represents on the basis of race or color in hiring, testing procedures, promotions, raises and job assignments. After some preliminary skirmishing, the bank answered on June 27, 1977 and denied the allegations of the complaint. On June 12, 1979 Katrina Terry and Phyllis Mosley, former bank employees, were permitted to intervene in this cause by order of Chief Judge G. Thomas Eisele and to assert charges of racial discrimination. Katrina Terry alleged that she was denied advancement opportunities and promotions because of her race. Phyllis Mosley made the same allegations and in addition claimed that she was discharged for racial reasons. Jerry Riley, Bobby Scott and George Spann were permitted to intervene in this cause on October 30, 1979. Riley and Scott are present employees of the Bank, and Spann is a former employee. These intervenors alleged racial discrimination on the basis of promotions, raises and work assignments. The bank has denied the allegations of the intervenors. On July 19, 1976 Norman Williams filed a complaint against Union Bank invoking the same code sections as Paxton and making similar allegations (LR-76-C-239). On September 20, 1978 this case was consolidated with the Paxton case (LR-76-C-110). On September 25, 1978 Harold Dominic Brown filed an individual and class action suit against the Union National Bank alleging jurisdiction under 42 U.S.C. § 2000e et seq. and a broad spectrum of discrimination employment practices on the part of defendant bank (LR-C-78-330). On October 16, 1978 the bank filed its answer denying the allegations of the complaint. On August 28, 1979 Chief Judge Eisele ordered a consolidation of the Brown case (LR-C-78-330) with the Paxton case (LR-76-C-110). Bobby Scott, one of the intervenors in the Paxton case, settled his intervention and was dismissed from the litigation by order of Judge Eisele on April 3, 1980. The consolidated cases were set for trial before Chief Judge Eisele on April 7, 1980. At the outset of the trial, the case of Norman Williams v. Union National Bank (LR-C-76-239) was dismissed without objection by Judge Eisele under Rule 41(b) Fed.R.Civ.P. The status of the litigation was then

as follows. The case of Harold Dominic Brown v. Union National Bank (LR-C-78-330) had been consolidated with Melvin Paxton, Jr. v. Union National Bank (LR-76-C-110). In the latter case there were four remaining intervenors—Katrina Terry, Phyllis Mosley, Jerry Riley, and George Spann. Judge Eisele decided that he would take testimony in this matter on both the class action and individual claims and issue such further orders as was justified by the evidence. He took testimony on April 7 through April 11, April 14, 15 and 18, August 12, 13, 14, 15, 19, 20 and 21, all in 1980. After these 15 trial days, Chief Judge Eisele recused in this case on August 21, 1980. His reasons for doing so are set forth in a lengthy memorandum dated September 4, 1980 and will not be repeated here. On September 18, 1980 Chief Judge Donald P. Lay of the Court of Appeals of this Circuit assigned the case to me. It was set for a continuation of testimony on April 7, 1981. By letter dated November 12, 1980, I advised counsel of my unwillingness to rehear the evidence heard by Judge Eisele. The parties were directed to furnish me with a complete transcript of the testimony by February 1, 1981. Cost of the transcript was to be shared on the basis of one-half by the bank and one-half by the plaintiffs and intervenors. I reserved the right to tax the entire transcript cost on the losing party. Testimony was begun before me on April 7, 1981 and continued through April 9. It was resumed on April 13 and continued through April 16; resumed on April 20 and concluded on April 23—a total of eleven days of trial time extended over three weeks. If this time is added to Judge Eisele's trial time of fifteen days, it will be seen that 26 days have been spent in trial time alone. This does not include the time spent in several pretrial conferences. The case has hardly justified such a large expenditure of judicial time and resources, not to mention the time, trouble and expenditure of the parties and their counsel. After carfully reading the transcript of the testimony taken before Judge Eisele and after hearing eleven days of testimony, during which copious notes were taken, I have some difficulty in understanding the wisdom of filing and proceeding with this lawsuit. There are undoubtedly a number of employers in this district who are discriminating against their employees, but

Union National Bank would not seem to be one of them—at least not from the evidence produced by plaintiffs and intervenors in this case.

I find the claims of the plaintiff and the intervenors to be without merit on an individual or class action basis. This bank has aggressively pursued affirmative action during the period in question. The case developed by the plaintiffs and intervenors has a number of fatal flaws. One of the most glaring is that inadequate discovery was undertaken, with the result that the major portion of plaintiffs and intervenors' case consisted of in-court discovery of bank officials. The lengthy examination of these adverse witnesses produced little evidence of value to plaintiffs and intervenors but much evidence that was very harmful to their cause. This trial tactic did result in a great expenditure of trial time. After plaintiffs' counsel had examined Joseph E. Zegler, the bank's personnel director, as an adverse witness for an entire week, Chief Judge Eisele made the following comments, which I consider very apropos:

> [W]hat I am concerned about is that the questions reveal that discovery that should have been made either wasn't made or is not available to Mr. Walker in many respects because he has asked if the man knows something about it. He finds out that he doesn't. Had he asked during the discovery period he would have found it out and he wouldn't have to take the Court's time to know that. He could have done it by other means. So to a large extent this week has been in essence a discovery of the limits of this man's knowledge, much of which is very limited and which he has demonstrated he would not be the appropriate witness to make the proof that Mr. Walker seeks to make, but which could be made by the proof.
>
> I feel that it has gone on tremendously long in comparison to the meat that has come out of it in terms of the facts. To have the witness state over and over that he doesn't know, that he would have to look at his records, that he doesn't recall when there are other witnesses who obviously would know this information and should be called for that purpose, it seems to be an imposition upon the Court. (T. 918-19)

Even more harmful to the plaintiff and intervenors were some of their own witnesses. Mike Mothershed is a good illustration. Mr. Mothershed, a black, is now the night supervisor of computer operators at the bank. He has two blacks and eight whites under his direction—two lead computer operators, two computer operators, one computer operator trainee, four distributors and balance clerks and one data librarian. He could hardly be insensitive to discrimination against blacks because his sister, Thelma Mothershed, was one of the eight black students who braved an unruly and abusive mob, encouraged by unscrupulous demagogues, to integrate Little Rock Central High School in 1957. Mothershed denied that the bank had been guilty of discriminatory practices toward him or other employees. His own career at this bank substantiates his testimony. Mothershed was hired by Union National Bank after he was discharged by First National Bank for which he candidly admitted was a mistake on his part. He testified that Mr. Zegler at Union Bank had given him another chance when he needed a job. Mothershed was hired as a messenger in the mail room on April 13, 1975 at $380.00 monthly. In the six years of his employment, Mothershed has had six promotions and eleven salary increases (Def. Exh. 80). He is now earning $1,400 a month. Mothershed testified that he had at one time registered a discrimination complaint because he felt that a white employee had been moved ahead of him, but that the bank had established to his satisfaction that its decision had been based on the superior knowledge and experience of the other employee. Testimony had been elicited that Mothershed had been the subject of discrimination because he had not been made a computer programmer. However, Mothershed testified that he had been offered that opportunity but had declined because he was not interested in becoming a computer programmer. He also testified that he has specifically requested the night shift assignment.

Another damaging witness called by the plaintiff and intervenors was Mrs. Mildred Hall, a black supervisor of the collection department at the bank. She had worked in the Treasurer's office at Sears Roebuck in Chicago, 1966-78, but

married a Little Rock resident and moved to Little Rock in 1978. Mrs. Hall denied discrimination in her own case and that of other employees. All employees under her supervision are white.

Two other blacks, called by plaintiffs and intervenors as adverse witnesses, seriously damaged their case—William Pierce and Charlotte Johnson. William Pierce has been a Senior Vice President of this bank since 1975. He had previously been executive director of the Arkansas Business Development Corporation and was for many years a field representative for the Arkansas Farm Bureau Federation. Pierce has been Chairman of the Board of the Little Rock Branch of the Federal Reserve Bank and has been a member of the Board of the Federal Reserve Bank. Plaintiffs and intervenors through their witnesses have tried to portray Pierce's employment as window-dressing. He is described as having no real duties or function at the bank. We reject this image. Pierce is a college graduate with a wide background in the Arkansas farming and business community, particularly in its black segment. Pierce is undoubtedly a considerable asset to Union Bank both as an executive and as a source of black business. Pierce testified as to the bank's aggressive affirmative action program after the control of the bank was assumed by Mr. Herbert McAdams about ten years ago. He testified as to the bank's continuing efforts to recruit black employees and to train prospective black employees. He testified that he is in constant communication with the personnel office with regard to the hiring and promotion of black employees. He used a chart of the bank work force of March 31, 1980 (Joint Exh. A) to illustrate wide dispersement of blacks through virtually all the bank's departments. He testified that even where the chart showed totally white departments, there had been blacks employed in these departments. An example he cited was auditing, shown to be completely white on March 31, 1980. Andrew Green, a black had been assistant auditor, the second job in the department. Pierce testified that the bank planned to promote Green to auditor upon retirement of the bank's chief auditor. This was confirmed by other testimony and by Green

himself, who left the bank to take what he considered to be a better job. Pierce denied discriminatory treatment of blacks at Union Bank. He concluded his cross-examination with this statement: "I don't think there's another bank in the area that can match what Union is attempting to do and has done [in affirmative action efforts]."

Mrs. Charlotte Johnson, another black witness called by plaintiffs and intervenors as an adverse witness, works in the bank's personnel office. She actually screens applicants to determine if further interest in their applications on the bank's part is justified. Mrs. Johnson testified that to her knowledge the bank had never mistreated an employee on account of race and no employee had ever complained to her in this regard. She knew of no instance where the bank had failed to promote an employee because of race or had discriminated in any regard because of an employee's race. I was impressed by the intelligence and forthrightness of this witness. In early 1979 Mrs. Johnson resigned from the bank to work in the office of Governor Bill Clinton. At the end of his term in January of 1981, she returned to the personnel office of the bank in her former capacity.

Besides the plaintiffs and intervenors themselves, who are the subject of detailed findings, *infra*, the case against the bank depends upon the testimony of Bobby Scott, Edith Williams, Tommy Sproles, Ralph Martin and two experts. Scott was originally an intervenor in the Paxton case but settled his case on the eve of the trial and is no longer a party. After strong criticism for his work performance (Def. Exh. 78(a)), Scott was discharged by the Bank on April 24, 1979 for failing to call his supervisor when absent from work on three consecutive days—violation of bank rules. At his unemployment compensation hearing, the bank discovered that a white employee had been guilty of the same infraction and had not been fired. The bank then reinstated Scott with back pay. He was given another chance as a computer operator trainee on May 14, 1980 (Def. Exh. 78(b)), and he is now a computer operator on the day shift. After 7 months as a computer trainee on a previous occasion, he had failed to master the job and was returned to

his former job as a distribution clerk. He blamed his failure on poor rapport with the operator who was training him, and the bank agreed to give him another chance on May 14, 1980 (Def. Exh. 78(b)). Scott displayed a great deal of hostility toward the defendant bank. For instance, he refuses to keep his own money in Union but is the customer of a competitor. He showed considerable resentment at having been called on the carpet for overdrafts and claimed that others had been guilty of overdrafts with impunity. Scott felt that he had individually been the object of discrimination by the bank. We need not explore this subject because his case was settled and he is no longer an individual litigant. His testimony would of course bear on the class allegations. We find it unpersuasive. He began work as a file sorter, an entry level job, on May 24, 1977 and has had a series of promotions and raises to his present position as computer operator. Scott's testimony consisted of criticism of the bank's policies in promotions and raises given to various employees in comparison to those awarded to others. With little direct knowledge of the reasons behind the management's personnel decisions, Scott draws sweeping inferences of discrimination. His testimony is based on gossip, hearsay and is generally unsubstantiated. His criticism of the bank's personnel actions in various individual cases has been effectively rebutted by the bank's records and witnesses and in some instances by the alleged discriminatees.

Even more unpersuasive is the testimony of Edith Williams. Ms. Williams worked as a secretary less than a year at the bank from September, 1976 to August, 1977, at which time she resigned. Documents from Ms. Williams' personnel file reflect that from the inception of her employment she was a serious disciplinary problem. She was unable to get along with either her supervisors or co-workers. She wrote beligerent notes to bank officers (Def. Exh. 82), refused to redraft a document when ordered by her supervisor (Def. Exh. 82), failed to shred material in violation of bank rules (Def. Exh. 83), performed her work poorly (Def. Exh. 84, 90), absented herself from her job without permission (Def. Exh. 85), could not or would not follow directions (Def. Exh. 86) or take direct orders from her

supervisor (Def. Exh. 87), and engaged in long personal telephone calls on bank time (Def. Exh. 88, 89). In the eleven months of her employment, Edith Williams was the subject of ten critical memos from her supervisor to the personnel department. As noted above, these covered a wide spectrum of insubordination and poor work performance. Like Bobby Scott, this witness made a number of vague, unsubstantiated charges of discrimination on the bank's part based on gossip and hearsay. Against the bank's charges of her own short-lived, poor work performance at Union Bank, her own criticisms of the bank's policies are entitled to scant weight in the evidentiary scale.

Mr. Tom Sproles, a black, was hired by Union National Bank as a branch manager on January 11, 1977 at a salary of $14,400. Incidentally, this was the highest salary paid to any branch manager; most of the white branch managers were paid $10,000 or less (Def. Exh. 7). At that time he was branch manager at First National Bank in Little Rock. He resigned July 7, 1979, after being severely criticized over an incident when he failed to properly document a loan and caused the bank to lose somewhere between $59,000 and $80,000. Until this incident Sproles had been a highly satisfactory employee, and there is no evidence of any friction with senior officers or any criticism of the bank for treatment of him or others. He was an officer making $17,400 a year with a $1500 expense account and various other fringe benefits. Sproles probably had a fine future with this bank until he made an egregious error, which would have cost him his job at many business institutions. The bank, however, did not discharge or demote him. It did justifiably criticize him. He took umbrage at the criticism and resigned. Like Bobby Scott and Edith Williams, he now makes nonspecific charges of discrimination against the bank. He named eight blacks against whom he claimed the bank had discriminated. They were Bill Pierce, Bob Donaldson, Wanda Jackson, Ralph Martin, Brenda Easterling, Jackie Jones, Diane Lefere, (T. 1906) and Jann Henderson (T. 1945). Pierce's testimony has been discussed, *supra*. He is a senior vice president of the bank. He has denied any discrimination on the Bank's part to him or anyone else. The only one of the others

who testified is Ralph Martin, and his testimony will be discussed presently. It should be noted, however, that Pierce, Bob Donaldson, Wanda Jackson and Jann Henderson are all presently officers of the bank. Donaldson is a branch manager, and Ms. Jackson is an installment loan officer. Jann Henderson is the commercial loan documentation officer with the responsibility of documenting loans as large as several million dollars. She is a highly regarded employee who was recently offered a position as a commercial loan officer. She turned down the offer because she did not want the responsibility of approving large loans. Brenda Easterling, formerly an assistant branch manager, is now a courtroom deputy in the U.S. District Clerk's office at Little Rock, Arkansas. She was employed as a teller trainee on March 24, 1976 and was later promoted to teller and assistant branch manager on July 1, 1979. In the three years of her employment, she received six salary increases. Her name was suggested in connection with the recusal of Judge Eisele, at which time plaintiff's counsel expressed an intention to call her as a witness. She was never called nor was Ms. Jones or Ms. Lefere. When pressed for specific instances of discrimination, Sproles' testimony proved untrustworthy. He was asked why he considered that the bank had discriminated against Bob Donaldson. He replied that Donaldson had been a branch manager trainee for 18 months before being made a branch manager (T. 1981). This testimony proved to be completely incorrect. Donaldson was a trainee for six months before being made a branch manager (Def. Exh. 8). Since Donaldson's employment at the bank on June 1, 1976 as a management trainee, he has had two promotions and six salary increases (Def. Exh. 9). As noted above, he is now a bank officer.

Ralph Martin, called as a rebuttal witness, was employed at the bank in August, 1976 as a management trainee at a salary of $650 monthly. He resigned on January 2, 1980, at which time he had moved up to installment loan officer and was making $11,700 annually. He left the bank to take a job with Western Electric as a staff associate at $17,900 annually, an increase of $6,200 in salary. Martin's testimony is subject to the same objection as that of Sproles. He made general allegations

that the bank discriminates against blacks, but he was difficult to pin down as to specifics. His testimony does not effectively rebut in any sense the strong defense made by the bank.

As is evident in the findings set forth *infra*, we have given great weight to the testimony of defendant's expert, Dr. James Gwartney, an economics professor from Florida State University. Dr. Gwartney has master and doctoral degrees in economics from the University of Washington. His areas of specialization are labor economics, economics of discrimination and micro-economics. He is the author of seven books and numerous articles published in the major professional journals of his areas of specialty (Def. Exh. 18). One of his articles, entitled "Statistics, the Law, and Title VII—An Economist's View," was published in the *Notre Dame Law Review* and was introduced in evidence (Def. Exh. 19). Dr. Gwartney's in-depth analysis of the issues in this case was most impressive. Actually, the only area in which Dr. Gwartney was seriously challenged by the two experts called by plaintiffs and intervenors was the area of discharge. Dr. Frank James, a math professor at the University of Arkansas, was the principal expert witness against the bank. He has a master's degree in math from the University of Arkansas and a doctorate from New York University. The approach of Dr. James to the issues in these cases was purely statistical. This is understandable since his entire academic background has been in the field of math and statistics. He has had no academic training in the field of labor economics, labor discrimination, employment discrimination statistics, or labor relations. The statistical analysis made by Dr. James was in many respects favorable to the bank. Dr. James admitted that the number of blacks employed at Union Bank was higher than black representation in the work force in the area. His figures showed that the bank is hiring almost twice the number of blacks percentage-wise as their representation in the work force—26.2% black hirees against 15.3% blacks in the work force (Pls. Exh. 7). His figures also show that the bank hired 26.29% blacks in the five-year period 1974-78 and only 22.8% of the blacks terminated. On the other hand, during this same period of time 73.8%

whites were hired and 77.2% whites terminated. These figures show that whites are terminated at a faster rate than blacks at this bank. With reference to these figures, Judge Eisele made the following comment with which the witness agreed:

> THE COURT: And the effect will be if that continues is that the white population in the enterprise will decrease and the black population is increasing, because even though they have like you pointed out a high rate of discharges, the terminations which cover them all shows that more blacks are being hired than are leaving and the reverse for the whites. Less whites are being hired than are leaving. So over a period of time the population of blacks—
>
> THE WITNESS: Would tend to increase marginally while the whites would tend to decrease.
>
> That trend is shown in Table 1 in terms of the percentage. If you consider the years '73 through '77, you will find a constant decrease in the white percentage and a fairly constant increase or at least a larger percentage in the '75, '76 and '77 black population. (T. 2139)

There was only one statistical area from which Dr. James could infer discrimination on the bank's part. This was in the area of discharges. In the period 1974-78 there were 117 discharges, 53 of which were black and 64 white. This undoubtedly showed a higher representation of blacks among those discharged in proportion to their representation in the bank's work force. An inference of discrimination is possible if we look at the bare statistics. In view of the bank's nondiscriminatory statistical performance in all other areas (hirees, initial job assignments, initial salary, promotions, salary increases, terminations, warnings, and discharges), the discharge figures are worthy of further analysis. Dr. Gwartney subjected these figures to such further analysis; Dr. James did not. For instance, Dr. Gwartney examined the discharge rate of those employees who had been with the bank at least two years. In this group of employees, there was no significant difference in the rate of discharge as between whites and blacks. In other words, Dr. Gwartney demonstrated that the high incidence of

black discharges occurred during the first two years of their employment. (Seventy out of seventy-seven of the black discharges from 1974 through 1980 occurred within the first two years of employment.) He also demonstrated through a series of tables set forth *infra* that there is a disproportionate number of black discharges only where the black had been hired in the same year as the discharge. The discharge figures are susceptible of one or two inferences. One is that the bank is discriminating against blacks in the area of discharges. Another is that the bank was an aggressive affirmative action employer who hired "high risk" black employees at a far higher rate than their qualified representation in the work force. Some of these black hirees are predestined to failure by virtue of such overrepresentation in their numbers. It is logical that their failures would occur in the first year. When a bank is hiring blacks at two or three times the expected rate and taking greater risks on black employees, some of these underqualified and undereducated hirees are not going to become suitable employees. These deficiencies in the sophisticated atmosphere of a bank will become quickly evident, and they will be discharged within the first year of their employment.

We accept the latter explanation for the high rate of discharge of short-term black employees. We reject the hypothesis that the rate of discharge of short-term black employees indicates discrimination on the bank's part. If the bank wanted to discriminate against blacks in the matter of discharge, it is inconceivable that it would discriminate only against a certain small group—the short-term employees. We also rely on some further analysis by Dr. Gwartney in accepting the nondiscriminatory explanation. Dr. Gwartney made an analysis of the number of warnings given to blacks prior to discharge vis-a-vis those given to whites. He found that blacks were given more warnings per discharge than whites. In other words, whites were more likely to be summarily discharged. The statistics illustrating this fact are set forth *infra*. Dr. Gwartney also analyzed in detail each of the discharges during the pertinent period—black and white—as to their factual background. Both from his analysis and from other evidence

presented by the bank, we are satisfied that there were reasonable objective facts supporting the decisions to discharge and that the decisions were unrelated to race.

Dr. John Fluker, the other expert called by plaintiffs and intervenors, took the same position as Dr. James in relation to discharges. We reject his conclusions from the discharge figures for the reasons set forth above. Dr. Fluker also concluded that the bank had discriminated because the mean starting salary at the bank was $531 for blacks and $656 for whites. We reject this comparison because Dr. Fluker took all the employees hired at the bank and made no attempt to compare whites and blacks hired in the same category of employment. Dr. Gwartney did make the latter type of comparison and found no significant difference in entry salaries for whites and blacks. Dr. Fluker also concluded there was discrimination in the fact that on June 1, 1979 there were three black officers and 77 white officers at the bank (there are more now). Since there were 80 officers out of 408 employees (of which 71 were black), Dr. Fluker concluded that there should be 14 black officers. We reject this kind of bare "warm body" statistical approach in making this analysis. Dr. Fluker did not consider availability of officer-qualified personnel in the work force. He also assumed that the capabilities, education and training of blacks and whites in the bank work force was equal. These later assumptions were patently unjustified by the evidence developed in this case.

In short we completely reject the claims of the plaintiffs Paxton and Brown and the intervenors that the defendant has discriminated against them. The proof to the contrary is overwhelming. We reject the class action allegations because the requirements of FRCP 23 have not been established by proof adduced on behalf of plaintiffs and intervenors. In support of these conclusions, we make the following specific findings of fact and conclusions of law. In these findings the abbreviation SMSA is used for Standard Metropolitan Statistical Analysis, a grouping used by the Census Bureau and the Arkansas Employment Security Division.

FINDINGS OF FACT

1. Herbert H. McAdams, an attorney and successful northwest Arkansas Banker, acquired a controlling interest in Union National Bank of Little Rock approximately ten years ago after the bank had undergone a period of instability and mismanagement.

2. Among the reforms he instituted at this bank was an aggressive affirmative action program. While there was an affirmative action program at the bank, Mr. McAdams expressed the desire to have it sharply improved. Mr. Joseph E. Zegler was brought into the bank on March 3, 1973 and given a direct mandate by McAdams to institute a comprehensive affirmative action plan. Mr. Zegler has applied himself conscientiously and sincerely to this task. Zegler has also instituted personnel office reforms in the area of job descriptions, salary grades, salary review and job evaluation. He also prepared a personnel policy manual (Def. Exh. 3), which contained the following statement under "Equal Opportunity Policy":

> It is the policy of Union National Bank to implement affirmatively equal opportunity to all qualified employees and applicants for employment without regard to race, creed, color, religion, or national origin. Positive action shall be taken to insure the fulfillment of this policy, including: one, hiring, placement, upgrading, transfer, or demotion; two, recruitment, advertising or solicitation or employment; three, treatment during employment; four, rates of pay or other forms of compensation; five, selection for training; six, termination. This policy is consistent with the requirements and objectives set forth by the presidential Executive Orders.
>
> Our objective is to obtain individuals qualified and-or trainable for positions by virtue of job-related standards of education, training, experience and personal qualifications. Responsibility for insuring compliance and implementation of the bank's policy on equal employment opportunity is assigned to the personnel director. The Executive

Committee will review this policy every 12 months and measure the results against the stated objectives.

3. In the bank's hiring and promotion policy since Mr. McAdams acquired control of the bank and particularly since Mr. Zegler became personnel manager, the following factors have been considered in hiring and promotion: education, experience and job performance. There is no credible evidence that race has played a part in either hiring or promotion at this bank. However, since the plaintiff and all of the intervenors were actually hired by the bank, we do not consider this a case of discriminatory hiring in either an individual or a class action sense.

4. The bank has had an active recruitment policy for black applicants and has sent integrated recruitment teams of bank employees to the predominantly black colleges in this area—University of Arkansas at Pine Bluff, Philander Smith at Little Rock, and Lemoyne-Owen in Memphis, Tennessee. These teams have also visited predominantly white colleges such as Ouachita Baptist at Arkadelphia, Arkansas.

5. The bank operates in-house training programs and offers other training programs in cooperation with various banking associations and educational institutions. For instance, the bank sends 15-20 people to a data processing school at Arkansas Tech College each year. There is a teller training school, and all employees are encouraged to attend American Institute of Banking classes. The latter classes are held in Little Rock during spring and fall semesters and consist of three-hour courses one night of the week for 14 weeks. Participation in the AIB courses is voluntary. Blacks do not participate in AIB courses in the same percentage as whites, but both races are actually encouraged to participate in this program. The bank also sends employees to the Arkansas Basic School of Banking, which is held each summer in two one-week sessions at Little Rock. This school deals with the fundamentals of banking. The bank also sends employees to graduate banking schools at Rutgers, LSU and SMU. There are intensive in-house training programs held during banking hours that cover a wide range of

banking subjects. All of these training programs are available to blacks as well as whites, and there is no evidence of discrimination by the bank in the selection of participants in these various training programs.

6. Every week the bank published an in-house news letter called "Who's Where." It lists all personnel transfers, promotions, terminations and openings and the new employees.

7. The bank leadership in late 1974 or early 1975 decided that there were disadvantaged people in the community who could be made more attractive to the banking community if they had some banking training. In conjunction with the Opportunities Industrialization Center, the bank established a course in basic training for blacks. The bank provided instructors and textbooks and defrayed all the costs of this program. It was the intent of the bank to provide these blacks with knowledge and skills that would make their likelihood of finding employment in banking more probable. This was the first involvement of OIC with banking and banking training for minorities in the Little Rock area. Classes were first held in the OIC classroom and then on-the-job training was given at Union Bank. All classroom instructors were Union Bank officers and employees. The program lasted twelve weeks, of which an eight-weeks period was classroom training and a four-weeks period was on-the-job training. Fifteen black students comprised the initial class and were all selected by the OIC. Although Union Bank made it clear that it was not obligated to hire any of these participants, it did in fact hire the entire first class, which was conducted in the summer of 1975. Some went into teller training, some into account services and some into the computer center. Four similar classes were conducted, and the bank hired participants from subsequent classes, but in diminishing numbers. The bank also operates a tuition refund program under which they will refund 75% of an employee's expenses for courses related to banking that are taken at a college or business school.

8. The banking industry is a low-salaried industry and has a problem in competing for competent personnel with highly unionized industries such as Southwestern Bell and Teletype

Corporation. Neither is its salary scale comparable to utilities such as Arkansas Power & Light Company and Arkansas Louisiana Gas Company. Bank salaries are also consistently lower than comparable positions in state, local and federal government. For this reason there is a large turnover of employees in the banking industry in central Arkansas. While Union Bank pay scales are comparable and competitive with other banks in central Arkansas, it shares with the latter the problem of attracting and holding desirable employees.

9. The bank has a discipline policy which is spelled out in its personnel policy manual and in its supervisor course. If an employee's performance is not satisfactory, the supervisor first advises the employee orally. If the sub-par performance continues, the employee is advised in writing of the specific criticism. If this does not work, a plan for improvement is instituted in which the supervisor and employee sit down, discuss the problem and what steps are needed to correct it. The next step, called a notice of disciplinary probation, involves a formal notice in writing of the need to correct the employee's deficiency. This notice is discussed personally with the employee and is signed by him. At this point the employee is placed on probation and given a specified number of days, usually between thirty and ninety, to take corrective action. If all these measures have failed, dismissal is considered. There are nine division heads, fifty-six department heads and sixty-nine supervisors in the bank. If there is a flagrant offense, the supervisor is authorized to terminate an employee on the spot. A flagrant offense is described by the bank's personnel director as theft, fighting, threatening a customer, refusing to follow a reasonable order or something of a similar nature. Otherwise, the decision to discharge is made only by the personnel director, the division manager and the department head in joint consultation. In the event of a disagreement, the final decision to terminate is made by the personnel director, who can be overruled only by the executive vice president. The written memoranda with respect to discipline goes into the employee's personnel file.

10. Authority over promotions and transfers is within the nine division managers as long as the employee's department is within his division. If the promotion or transfer is from one

division into another division, then the personnel department is involved in the decision. In seeking a promotion or transfer within the department or division, the employee would first deal with his supervisor. If he deserves promotion or transfer outside the department or division, he would first take it up with the personnel office, according to established bank procedures. In the latter eventuality the personnel office makes an estimate of qualifications, finds if an opening exists and coordinates with the gaining and losing departments in the promotion or transfer.

11. The bank has about thirty persons in 10-12 feeder-type classifications. These are entry level positions where people are on some occasions hired with little or no experience. They are, however, hired by the bank with the idea that at some point in time they will be promoted out of the feeder-type position.

12. There are 175 job descriptions in the bank, which are constantly being revised. These job descriptions do not embrace bank officers. Officer status normally results from recommendation by the division head.

13. Mr. Zegler, the Personnel Director, and Mr. William Pierce, a black senior vice president of the bank, cooperated in starting a program at the University of Arkansas at Pine Bluff, which has primarily been a black college. Under this program, black students in distributive education were hired into the bank and hired for a semester to expose them to the field of banking. Members of the UAPB faculty were brought into the bank in order to adjust their curriculum to train students who could be brought into the bank and upgraded to responsible positions.

14. At the initiative of Mr. McAdams, Union was the first bank in this area to start a Minority Enterprise Small Business Investment Corporation. The bank began this organization with an investment of $75,000 in early 1973, which was half of the total amount put into MESBIC by other financial institutions. Capitalization of MESBIC is matched by the Small Business Administration to take high risk loans in which minorities are involved.

15. When the Arkansas Business Development Corporation, a black-administered program, was begun, Herbert McAdams was a member of the board. He played a key role in helping this organization succeed and made available space to it in the Union Bank.

16. Union Bank sponsored a series of meetings with black ministers of all denominations in Little Rock to assist them in setting up their books, learning how to make a proper financial statement, and making loan applications. These meetings were staffed by officers from the bank's Consumer Loan, Commercial Loan and Accounting Departments.

17. Mr. William Pierce, a black Senior Vice President of Union Bank, meets several times a week with Mr. Zegler, the Personnel Director, and Mr. Dierks, the Assistant Personnel Director, to discuss how blacks can be moved from entry level jobs to those of higher responsibility. They also discuss how blacks are succeeding in productivity and possible openings which can be filled by blacks (T. 1258). They have utilized charts similar to Joint Exhibit A to assess the dispersement of blacks throughout the bank in order to determine if blacks can be elevated to certain positions (T. 1259). These men have made strong efforts to involve blacks in every area of the bank, and there are now blacks in most departments (T. 1259).

18. The typical complaint of both white and black employees of the bank is poor pay. The banking industry does not pay well. Only when officer status is obtained, do employees come into a stream of pay that is commensurate with other businesses and other industry (T. 1262). This is the principal reason for the high turnover in bank employees. Mr. William Pierce, the black Senior Vice President, is a focus of these complaints from blacks. His counsel to them is to develop their skills through educational courses offered by the bank.

19. At the time William Pierce was made senior vice president of this bank, he was the only black to occupy such a position in a white-owned bank in the Eighth Federal Reserve District, which includes Arkansas and Texas and parts of the States of Missouri, Kentucky, Tennessee, Mississippi and Illinois.

20. A white employee of the bank was fired on the spot for using derogatory racial terms to a black employee (T. 1282).

21. If an employer is discriminatory against a group of people, it will manifest itself statistically in disparity between similarly situated employees or persons that are chosen out of a labor pool or a promotion pool. The following factors are important in determining if discrimination has been present: (a) comparison of the representation of blacks in the appropriate work force pools with blacks in the employer's work force; (b) representation of blacks among the hirees of the employer in comparison to blacks in the appropriate labor market pool from which the employer draws its employees; (c) comparison of the hiring salaries of blacks to hiring salaries of white in similar positions; (d) comparison of promotions of blacks to promotions of whites; (e) comparison of terminations of blacks and terminations of whites; and (f) comparison of overall compensation to blacks to that of whites, that is, whether or not similar employees receive the same kinds of compensation.

22. According to the U.S. Census of 1970, the median years of schooling completed by professional and technical personnel is 16.2; accountants, 15.3; computer specialists, 15.5; bank officials and financial managers, 14.6; managers, salaried, 13.9; bank tellers, 12.6; bookkeepers, 12.6; file clerks, 12.4; office machine operators, 12.5 (Def. Exh. 20).

23. According to the 1970 U.S. Census, there are 27,148 blacks out of a total population of 175,157 (25 years of age or more) in Little Rock (SMSA) or a percentage of 15.5%. Of this group 98,964 completed 12 years or more of school, of which 8,042 or 8.1% were black. While 61.4% of the whites aged 25 years and over in Little Rock completed 12 or more years of schooling, only 29.6% of the blacks did so (Def. Exh. 21).

24. According to the 1970 United States Census, the representation of blacks in Little Rock (SMSA) in the various occupations involved in this litigation was as follows: Professional and technical workers as an entire classification, 8.7%. However, within this classification, 1.5% of accountants were

black and 0% of computer specialists. 3% of the managers and administrators were black, and 6.4% of the clerical workers were black. Within the latter classification, 4.5% of the bank tellers and cashiers were black, 0.6% of the bookkeepers and billing clerks, 4.5% of the file clerks, 5% of the secretaries and stenographers, and 6.4% of the typists (Def. Exh. 22).

25. According to a 1979 report of 16 Arkansas Employment Security Divisions, 6.3% of the Professional and Technical Employees (except for engineers, teachers, medical and health workers) in Little Rock (SMSA) were black. 2.7% of the managers and administrators and 6.1% of the clerical employees were black. 19.7% in all other occupations were black (Def. Exh. 23).

26. Pursuant to findings 22-25, it is further found that the availability of blacks in the various occupational and educational categories from which the bank draws its employees is approximately 6%-8%.

27. The representation of whites and blacks in the work force at Union National Bank, 1974-1980, is as follows:

No. of Employees as of December 31

Year	Total	White	Black	Percent Black
1974	332	293	39	11.8
1975	316	262	54	17.1
1976	343	288	55	16.0
1977	393	320	73	18.6
1978	408	336	72	17.7
1979	441	362	79	17.9
1980	432	358	74	17.1
1974-80 (Average)	380.7	317.0	63.7	16.7

28. The representation of blacks in the work force at Union National Bank is approximately twice their availability in the occupations from which the bank hires intensely.

29. The representation of blacks in the work force at Union Bank at year end 1974-80 compared to their representation in the labor market pool is set forth *infra*. The acceptable range in the last column is derived by using the percentage of blacks in the labor market pool (column 1) as the benchmark. The acceptable range is the expected number of blacks (column 3) plus or minus two standard deviations. This procedure is in accordance with the technique approved by the Supreme Court in *United States v. Hazelwood School District*, 433 U.S. 299, 308, footnote 14, 97 S.Ct. 2736, 2742, footnote 14, 53 L.Ed.2d 768 (1977). The data on Union National Bank employees were derived from the employment history sheets provided by the bank for all employees present during 1974-80. The labor market pool data (column 1) are from the Arkansas Employment Security Division, *Manpower Information for Affirmative Action Programs—1979* (Table 3):

1975

Occupation	Blacks as a Percent of the Labor Market Pool 1978	Total No. of Employees UNB Work Force, 1975	Expected No. of Black Employees	Observed No. of Black Employees	Acceptable Range (No. of Black Employees)
Professional & Technical..	6.3	11	0.7	1	0.0- 2.3
Managers & Administrators.....	2.7	74	2.0	1	0.0- 4.8
Clerical Workers.....	6.1	214	13.1	46	5.9-19.1
All others.....	19.7	17	3.3	6	0.0- 6.6
Total.....	—	316	19.1	54	—

1976

Occupation	Blacks as a Percent of the Labor Market Pool 1978	Total No. of Employees UNB Work Force, 1976	Expected No. of Black Employees	Observed No. of Black Employes	Acceptable Range (No. of Black Employees
Professional & Technical..	6.3	13	0.8	2	0.0- 2.6
Managers & Administrators.....	2.7	81	2.2	3	0.0- 5.1
Clerical Workers.....	6.1	234	14.3	45	7.0-21.6
All others.....	19.7	15	3.0	5	0.0- 6.1
Total	—	343	20.3	55	—

1978

Occupation	Blacks as a Percent of the Labor Market Pool 1978	Total No. of Employees UNB Work Force, 1978	Expected No. of Black Employees	Observed No. of Black Employees	Acceptable Range (No. of Black Employees)
Professional & Technical..	6.3	20	1.3	2	0.0- 3.5
Managers & Administrators.....	2.7	85	2.3	2	0.0- 5.3
Clerical Workers.....	6.1	295	18.0	64	9.8-26.2
All others.....	19.7	8	1.6	4	0.0- 3.8
Total	—	408	23.2	72	—

1979

Occupation	Blacks As a Percent of the Labor Market Pool 1978	Total No. of Employees UNB Work Force, 1979	Expected No. of Black Employees	Observed No. of Black Employees	Acceptable Range (No. of Black Employees)
Professional & Technical..	6.3	11	0.7	1	0.0- 2.3
Managers & Administrators.....	2.7	74	2.0	1	0.0- 4.8
Clerical Workers.....	6.1	214	13.1	46	5/9-19.1
All others.....	19.7	17	3.3	6	0.0- 6.6
Total	—	316	19.1	54	—

1980

Occupation	Blacks As a Percent of the Labor Market Pool 1978	Total No. of Employees UNB Work Force, 1980	Expected No. of Black Employees	Observed No. of Black Employees	Acceptable Range (No. of Black Employees)
Professional & Technical..	6.3	17	1.1	1	0.0- 3.1
Managers & Administrators.....	2.7	79	2.1	4	0.0- 5.0
Clerical Workers.....	6.1	311	19.0	65	10.6-27.4
All Others.....	19.7	25	4.9	4	0.9- 8.9
Total.....	—	432	27.1	74	—

30. If unemployed members of the work force were included in the above figure, the result would not be materially changed, since during the period in question, roughly 95 of the work force was employed (T. 2309-12).

31. The benchmark figures used above are substantiated by the fact that in 1973-74, 4.9% of those receiving a college degree in business and management were blacks and 4.6% of those receiving degrees in computer science were black. In 1975-76 the figures were 6.6% and 5.8% respectively (T. 2312-13).

32. Approximately two-thirds of the bank's work force is clerical. Based on availability of black clerical workers in the work force, the Union Bank in the years 1975-80 had about three times the number of such employees in its work force that would be expected (T. 2316).

33. During the years 1975-80 in every classification of occupation utilized by the bank, based on Arkansas Employment Security Division statistics, it is observed that representation of blacks at Union Bank exceeded the expected representation of blacks. For example, whereas in 1975 it would be expected that 19 blacks would be employed in the bank, actually 54 were in its work force; in 1976 the figures were 20

expected and 55 actually in its work force; in 1978, 23 were expected but 73 blacks were actually in the bank's work force; in 1979, 26 expected but 76 in the work force; and in 1980, 27 expected but 74 in the work force.

34. During the period 1975-80, the representation of blacks in the bank's work force exceeds their representation in the total population of Little Rock (SMSA) and in the work force of Little Rock (SMSA).

35. If in fact the Union Bank was discriminatory against black employees during the years 1975-80, an underrepresentation of blacks in the various work categories and an underrepresentation of blacks in the aggregate work force would have been manifest in the figures quoted, *supra*. The opposite conclusion is evident from the figures.

36. The makeup of hirees of the bank during the year 1974-80 is shown by the following figures:

No. of Employees as of December 31

Year	Total	White	Black	Percent Black
1974	194	159	35	18.0
1975	108	65	43	39.8
1976	175	131	44	25.1
1977	233	173	60	25.8
1978	211	171	40	19.0
1979	240	191	49	20.4
1980	174	137	37	21.3
Total, 1974-80	1,335	1,027	308	23.1

37. The percentage of blacks among hirees set forth in finding number 37 is substantially greater than their representation in the Little Rock labor force and in the population of Little Rock. It is about three times the black representation

among persons who have completed a high school degree (8%) and substantially greater than representation among the clerical work force and among professional and clerical workers. To summarize, blacks have been hired by the Union National Bank at a greater percentage than their representation in any kind of benchmark that might be utilized.

38. If the hiring is broken down by job classification, we find that in the period 1974-80 the number of black hirees in each classification substantially exceeded the number of expected hirees. The following figures make the point:

1974-76

Occupation	Blacks as a Percent of the Labor Market Pool 1978	Total No. of Employees Hired by UNB 1974-76	Expected No. of Black Hirees	Observed No. of Black Hirees	Acceptable Range (No. of Black Hirees)
Professional & Technical..	6.3	11	0.7	2	0.0- 2.3
Managers & Administrators.....	2.7	33	0.9	3	0.0- 2.8
Clerical Workers.....	6.1	408	24.9	104	15.2-34.6
All Others.....	19.7	25	4.9	13	0.9- 8.9
Total.....	—	477	31.4	122	—

1977-78

Occupation	Blacks as a Percent of the Labor Market Pool 1978	Total No. of Employees Hired by UNB 1977-78	Expected No. of Black Hirees	Observed No. of Black Hirees	Acceptable Range (No. of Black Hirees)
Professional & Technical..	6.3	16	1.0	0	0.0- 2.9
Managers & Administrators.....	2.7	18	0.5	1	0.0- 1.9
Clerical Workers.....	6.1	394	24.0	94	14.5-33.5
All Others.....	19.7	16	3.2	5	0.0- 6.4
Total.....	—	444	28.7	100	—

1979-80

Occupation	Blacks as a Percent of the Labor Market Pool 1978	Total No. of Employees Hired by UNB 1979-80	Expected No. of Black Employees	Observed No. of Black Employees	Acceptable Range (No. of Black Employees)
Professional & Technical..	6.3	7	0.4	0	0.0- 1.7
Managers & Administrators	2.7	14	0.4	0	0.0- 1.6
Clerical Workers	6.1	352	21.5	79	12.5-30.5
All Others	19.7	41	8.1	7	3.0-13.2
Total	—	414	30.4	86	—

39. A reasonable and proper inference from these figures is that the Union National Bank is aggressively and actively pursuing affirmative action policies and is making strong efforts to provide employment opportunities for blacks in the Little Rock area.

40. There is no significant black-white variation in the mean initial monthly salaries of full-time employees hired during the period 1974-78 as is illustrated by the following figures:

1974-75

Occupation	No. of Hirees		Mean Initial Monthly Salary		
	W	B	W	B	B/W Percent
Professional & Technical..	6	2	$862	$856	99.3
Managers & Administrators	19	1	$1247	$2500	200.5
Sales Representatives	1	1	$575	$475	82.6
Collectors	1	0	$500	—	—
Computer Operators	9	1	$462	$450	97.4
Secretaries	9	3	$514	$442	86.0
All Other Clerical Workers	133	53	$393	$398	101.3
All Other Workers	0	3	—	$390	—

1976-77

Occupation	No. of Hirees		Mean Initial Monthly Salary		
	W	B	W	B	B/W Percent
Professional & Technical..	10	0	$1032	—	—
Managers & Administrators	19	3	$1078	$833	77.3
Collectors	2	1	$600	$575	95.8
Computer Operators	10	3	$523	$458	87.6
Secretaries	9	0	$578	—	—
All Other Clerical Workers	206	82	$470	$449	95.5
All Other Employees	0	1	—	$450	—

1978

Occupation	No. of Hirees		Mean Initial Monthly Salary		
	W	B	W	B	B/W Percent
Professional and Technical	7	0	$1328	—	—
Managers and Administrators	10	0	$1058	—	—
Sales Representatives	1	0	$700	—	—
Collectors	6	2	$700	$625	89.3
Computer Operators	7	1	$642	$500	77.9
Secretaries	5	0	$608	—	—
All Other Clerical Workers	97	28	$505	$504	99.8
All Other Employees	5	1	$542	$500	92.3

41. The figures that are significant to the court in the tables immediately above are those under the category "all other clerical workers" constituting the vast majority of the people hired. The other categories would appear to be too small numerically and generally require specialized training or ex-

perience prior to hiring. Even in these small categories, we do not find significant differences in pay except for computer operators and secretaries, which could be explained by varying levels of experience and education. In the "all other clerical workers" there was a slight differential in favor of the blacks in 1974-75 and a slight differential in favor of the whites in later years. A fair and reasonable inference is that Union Bank was not guilty of discrimination against blacks in their initial salary rate, and the court so finds.

42. Blacks in the Union Bank have been promoted at a higher rate than would be expected. For example at the beginning of 1974, 9.9% of the bank's work force was black. There were 75 promotions during that year and of those promotions, if the 9.9% of the blacks had received their share, we would have expected that blacks would have received 7.4% of the promotions. The observed rate was 14%, well over the expected rate. Promotion is defined as a change in job title accompanied by an increase in earnings. The figures for the entire 1974-80 are given in the following table:

Year	Blacks as a Percent of UNB Work Force at the Beginning of the Year	No. of Promotions During the Year	Expected No. of Promotions Received by Blacks	Observed No. of Promotions Received by Blacks	Acceptable Range (No. of Promotions for Blacks)
1974	9.9	75	7.4	14	2.2-12.6
1975	1.8	30	3.5	6	0.0- 7.0
1976	17.1	55	9.4	12	3.8-16.0
1977	16.0	42	6.7	11	1.9-11.5
1978	18.6	65	12.1	10	5.7-18.5
1979	17.7	73	12.9	21	6.4-19.4
1980	17.9	64	11.5	15	5.4-17.6
Total	—	404	63.5	89	—

43. There was no discrimination against blacks at the Union National Bank in the matter of promotions. As a matter of fact, in every year beginning in 1974, with the exception of

1978, blacks have been promoted at a far higher rate than would be expected. The difference in 1978 was insignificant.

44. Blacks at Union National Bank have also received a greater number of salary increases than would be expected on a statistical basis. In the following table change in position is not considered, but only whether an increase in pay was given:

1974-80

Year	Blacks as a Percent of UNB Work Force at the Beginning of the Year	No. of Salary Increases During the Year	Expected Number of Salary Increases Received By Blacks	Observed Number of Salary Increases Received By Blacks	Acceptable Range (No. of Salary Increases for Blacks)
1974	9.9	419	41.5	45	29.3- 53.7
1975	11.8	310	36.6	45	25.2- 48.0
1976	17.1	302	51.6	50	38.5- 64.7
1977	16.0	325	52.0	55	38.8- 65.2
1978	18.6	411	76.4	88	60.4- 92.4
1979	17.7	449	79.5	82	63.3- 95.7
1980	17.9	521	93.3	97	75.8-110.8
Total	—	2737	430.9	462	—

45. There has been no discrimination against blacks at the Union National Bank in reference to the number of salary increases given to black employees. Blacks received their share of upgrades whether an upgrade be defined as only a raise or a raise plus a change of position. The data suggests that blacks received a higher percentage of upgrades than would be expected statistically. There is no evidence of a disparate impact in the area of salary or promotion.

46. If we go further and delve into the mean change in monthly salary for employees receiving an increase in monthly salary rate or an increase with a change in job title at Union Bank in the 1974-80 period, we find that there is no significant difference in the figures for black and white employees. This conclusion is substantiated by Defendant's Exhibits 34(c) through 34(i) and 35(b) through 35(H).

47. If terminations of employees are considered, whether voluntary or involuntary, there is no significant difference in the number of blacks and whites terminating in the period 1974-80. This is illustrated by the following tables which take the terminations during each year and classify them according to how long the employees had been with the bank. This is a significant relationship because the longer a person has been with an employer, the less likely he is to terminate. In this series of tables *infra*, it is conclusively demonstrated that the higher number of blacks terminating is to be found in the short-term employees. For example, out of 28 blacks terminating in 1974, 17 had been hired that same year. Even so, in no year is the number of blacks terminating outside an acceptable range; actually, in each year the figure is almost exactly what would be expected. The tables follow:

1974

Years of Hire	Black Employees Present in 1974 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1974	18.0	78	14.0	17	7.2-20.8
1973	16.4	53	8.7	8	3.3-14.1
1972	11.5	25	2.9	1	0.0- 5.1
1969-71	5.3	8	0.4	1	0.0- 1.7
Prior to 1969	4.8	23	1.1	1	0.0- 3.1
Total	—	187	27.1	28	—

1975

Years of Hire	Black Employees Present in 1975 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1975	40.2	29	11.7	14	6.4-17.0
1974	15.5	55	8.5	11	3.1-13.9
1973	17.5	20	3.5	2	0.1- 6.9
1970-72	10.9	10	1.1	1	0.0- 3.1
Prior to 1970	5.3	10	0.5	0	0.0- 1.9
Total	—	124	25.3	28	—

1976

Years of Hire	Black Employees Present in 1976 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1976	44.0	63	27.7	19	19.8-35.6
1975	29.0	38	11.0	15	5.4-16.6
1974	7.0	21	1.5	2	0.0- 3.8
1971-73	12.0	13	1.6	7	0.0- 3.9
Prior to 1971	6.0	14	0.8	0	0.0- 2.6
Total	—	149	42.6	43	—

1977

Years of Hire	Black Employees Present in 1977 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1977	25.8	87	22.4	24	14.2-30.6
1976	22.3	53	11.8	10	5.7-17.9
1975	35.0	11	3.9	5	0.7- 7.1
1972-74	10.0	19	2.1	2	0.0- 4.8
Prior to 1972	7.1	14	1.0	1	0.0- 2.9
Total	—	184	41.2	42	—

1978

Years of Hire	Black Employees Present in 1978 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1978	19.0	86	16.3	18	9.0-23.6
1977	24.7	68	16.7	14	9.6-23.8
1976	25.4	18	4.6	5	0.9-8.3
1973-75	23.2	6	1.4	2	0.0- 3.5
Prior to 1973	7.6	18	1.4	3	0.0- 3.6
Total	—	196	40.4	42	—

1979

Years of Hire	Black Employees Present in 1979 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1979	20.4	82	16.7	16	9.4-20.0
1978	17.7	56	9.9	12	4.2-15.6
1977	28.2	30	8.5	8	2.6-13.4
1974-76	23.1	22	5.1	6	1.1- 9.1
Prior to 1974	6.2	17	1.1	1	0.0- 3.1
Total	—	207	41.3	43	—

1980

Years of Hire	Black Employees Present in 1980 as a Percent of the Total	No. of Employees Terminating	Expected No. of Blacks Terminating	Observed No. of Blacks Terminating	Acceptable Range (No. of Blacks Terminating)
1980	21.3	55	11.7	14	5.6-17.8
1979	20.3	73	14.8	15	7.9-21.7
1978	15.9	18	2.9	3	0.0- 6.0
1975-77	25.8	15	3.9	4	0.5- 7.3
Prior to 1975	6.3	14	0.9	4	0.0- 2.7
Total	—	175	34.2	40	—

48. A fair and reasonable inference from the tables set forth immediately *supra* is that there was no discrimination against blacks in the matter of terminations by the Union Bank and the court so finds. The court further finds that the proportion of whites hired to whites terminated in comparison to blacks hired to blacks terminated will necessarily result in a continuing increase of black percentages at the Union Bank (T. 2378-79). The relevant question of disparate impact in the matter of termination is whether the blacks and whites who have the same seniority have different termination rates. We find that they do not.

49. The following figures represent the number of blacks discharged in a stated year with the percentage which discharges represent of the total terminations during the year: 1974, 26 (13.9%); 1975, 18 (14.5%); 1976, 17 (11.4%); 1977, 31 (16.8%); 1978, 27 (13.8%); 1979, 24 (11.6%); 1980, 28 (16%)—Total 171 (14%).

50. If we focus on the number of blacks discharged in the year 1974 to 1980, we find that there is a disproportionate number of black dischargees only where the blacks had been hired in the same year as the discharge. The tables which illustrate this fact are as follows:

1974

Years of Hire	Black Employees Present in 1974 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1974	18.0	15	2.7	9	0.0-5.7
1973	16.4	9	1.5	2	0.0-3.7
1972	11.5	1	0.1	0	0.0-0.7
1969-71	5.3	0	0.0	0	0.0-0.0
Prior to 1969	4.8	1	0.1	0	0.0-0.7
Total	—	26	4.4	11	—

1975

Years of Hire	Black Employees Present in 1975 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1975	40.2	6	2.4	5	0.0-4.8
1974	15.5	7	1.1	2	0.0-3.0
1973	17.5	2	0.4	0	0.0-1.5
1970-72	10.9	2	0.2	1	0.0-1.1
Prior to 1970	5.3	1	0.1	0	0.0-0.5
Total	—	18	4.2	8	—

1976

Years of Hire	Black Employees Present in 1976 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1976	25.1	7	1.8	3	0.0-4.1
1975	37.0	6	2.2	4	0.0-4.6
1974	7.0	2	0.1	0	0.0-0.8
1971-73	12.0	0	0.0	0	0.0-0.0
Prior to 1971	6.0	2	0.1	0	0.0-0.7
Total	—	17	4.2	7	—

1977

Years of Hire	Black Employees Present in 1977 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1977	25.8	17	4.4	10	0.8-8.0
1976	22.3	10	2.2	6	0.0-4.8
1975	35.0	0	0.0	0	0.0-0.0
1972-74	10.8	3	0.3	1	0.0-1.4
Prior to 1972	7.1	1	0.1	0	0.0-0.6
Total	—	31	7.0	17	—

1978

Years of Hire	Black Employees Present in 1978 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1978	19.0	14	2.7	7	0.0-5.6
1977	24.7	7	1.7	2	0.0-4.0
1976	25.4	2	0.5	1	0.0-1.7
1973-75	23.2	2	0.5	0	0.0-1.7
Prior to 1973	7.6	2	0.2	0	0.0-1.0
Total	—	27	5.6	10	—

1979

Years of Hire	Black Employees Present in 1979 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1979	20.4	11	2.2	7	0.0-4.9
1978	17.7	7	1.2	2	0.0-3.2
1977	28.2	3	0.8	1	0.0-2.4
1974-76	23.1	1	0.2	0	0.0-1.0
Prior to 1974	6.2	2	0.1	1	0.0-0.8
Total	—	24	4.5	11	—

1980

Years of Hire	Black Employees Present in 1980 as a Percent of the Total	No. of Employees Discharged	Expected No. of Blacks Discharged	Observed No. of Blacks Discharged	Acceptable Range (No. of Blacks Discharged)
1980	21.3	9	1.9	4	0.0-4.4
1979	20.3	13	2.6	7	0.0-5.5
1978	15.9	3	0.5	1	0.0-1.8
1975-77	25.8	1	0.3	0	0.0-1.0
Prior to 1975	6.3	2	0.1	1	0.0-0.8
Total	—	28	5.4	13	—

51. We infer from the tables set forth immediately *supra* and other evidence in this case and so find that there is an overrepresentation of blacks among employees who have been discharged because Union Bank has been aggressive in its affirmative action policy and is accepting a lower standard for blacks as indicated by the overrepresentation of blacks among the bank's hirees. It is hiring blacks at two or three times the expected rate and is therefore taking greater risks on black employees than on white employees. This greater risk becomes particularly manifest in the short term employees, some of whom are simply not suitable employees, a fact the bank

discovers after a short time. We find that this is a necessary concomitant where employment opportunity is being given to a disproportionate number of underqualified and undereducated people. If we look at the discharge rates of employees who have been at the bank for more than two years, there is no difference in the discharge rate of blacks and whites. We reject the hypothesis that the rate of discharge of blacks employed for only a short time indicates discrimination on the bank's part. If the bank wanted to discriminate against blacks in the matter of discharge, it is inconceivable that it would discriminate only against a certain small group—those who had been there only a short time.

52. The above finding is reinforced by statistical studies with regard to the warnings given to black and white employees prior to discharge. Whites were much more likely to be discharged with no prior warning whatsoever. In spite of smaller numbers, blacks were given substantially more warnings than whites prior to discharge. In other words, the bank was far more patient with the shortcomings of black employees than it was with those of white employees. This is illustrated by the following table for the years 1974-78:

		Whites	Blacks
1.	Number of Employees Discharged, 1974-78	66	53
2.	Number of Employees Discharged Without Formal Prior Warning, 1974-78	41	16
3.	Percent of Employees Discharged Without Formal Warning, 1974-78	62.1	30.2
4.	Total Number of Formal Warnings Given to Discharged Employees, 1974-78	55	78
5.	Mean Number of Formal Warnings Given to Discharged Employees, 1974-78	0.83	1.47

If the employees fired without warning are classified according to reason for discharge, the whites exceed the blacks in every category except embezzlement/misappropriation (Def. Exhs. 49, F, F(1), F(2)). If we search deeper into the matter of warning prior to discharge and classify the discharges according to reason for discharge, we find that in each category the warning per discharge was higher for blacks than for whites,

again indicating patience and tolerance on the bank's part toward its black employees and a reluctance to discharge them. This is illustrated by the following table:

	Reason for Discharge	No. of Employed Discharged for the Reason		No. of Notifications Employees Received Warning of the Need for Corrective Action		Warnings Per Discharge	
		White	Black	White	Black	White	Black
1.	Excessive Overdrafts	8	4	7	12	0.88	3.00
2.	Misappropriation of Funds	1	5	0	0	0.00	0.00
3.	Absenteeism & Tardiness	13	7	8	19	0.62	2.71
4.	Misconduct	10	11	2	5	0.20	0.45
5.	Inefficiency & Poor Performance	25	24	29	30	1.16	1.25
6.	Miscellaneous	9	2	12	9	1.33	4.50

53. A statistical study of blacks voluntarily terminating their employment at Union National Bank, *infra* demonstrates that their voluntary termination in every year except one was less than the statistically expected rate. This study also demonstrates that most blacks voluntarily quit in the year of their hire:

1974

Year of Hire	Black Employees Present in 1974 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1974	18.0	63	11.3	8	5.2-17.4
1973	16.4	44	7.2	6	2.3-12.1
1972	11.5	24	2.8	1	0.0- 5.9
1969-71	5.3	8	0.4	1	0.0- 1.7
Prior to 1969	4.8	22	1.1	1	0.0- 3.1
Total	—	161	22.8	17	—

1975

Year of Hire	Black Employees Present in 1975 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1975	40.2	23	9.2	9	4.5-13.9
1974	15.5	48	7.4	9	2.4-12.4
1973	17.5	18	3.2	2	0.0- 6.4
1970-72	10.9	8	0.9	0	0.0- 2.7
Prior to 1970	5.3	9	0.5	0	0.0- 1.8
Total	—	106	21.2	20	—

1976

Year of Hire	Black Employees Present in 1976 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1976	25.1	56	14.1	16	2.6-20.6
1975	37.0	32	11.8	11	6.3-17.3
1974	7.0	19	1.3	2	0.0- 3.5
1971-73	12.0	13	1.6	7	0.0- 3.9
Prior to 1971	6.0	12	0.7	0	0.0- 2.3
Total	—	132	29.5	36	—

1977

Year of Hire	Black Employees Present in 1977 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1977	25.8	70	18.1	14	10.8-25.4
1976	22.3	43	9.6	4	4.1-15.1
1975	35.0	11	3.9	5	0.7- 7.1
1972-74	10.8	16	1.7	1	0.0- 4.2
Prior to 1972	7.1	13	0.9	1	0.0- 2.8
Total	—	153	34.2	25	—

1978

Year of Hire	Black Employees Present in 1978 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1978	19.0	72	13.7	11	7.0-20.4
1977	24.7	61	15.1	12	8.4-21.8
1976	25.4	16	4.1	4	0.6- 7.6
1973-75	23.2	4	0.9	2	0.0- 2.6
Prior to 1973	7.6	16	1.2	3	0.0- 3.3
Total	—	169	35.0	32	—

1979

Year of Hire	Black Employees Present in 1979 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1979	20.4	71	14.4	13	7.6-21.2
1978	17.7	49	8.7	10	3.4-14.0
1977	28.2	27	7.6	7	2.9-12.3
1974-76	23.1	21	4.9	6	1.0- 8.8
Prior to 1974	6.2	15	0.9	0	0.0- 2.8
Total	—	183	36.5	36	—

1980

Year of Hire	Black Employees Present in 1980 As a Percent of the Total	No. of Employees Quitting Voluntarily	Expected No. of Blacks Quitting	Observed No. of Blacks Quitting	Acceptable Range (No. of Blacks Quitting)
1980	21.3	46	9.8	10	3.5-16.1
1979	20.3	60	12.2	8	6.0-18.4
1978	15.9	15	2.4	2	0.0- 5.2
1975-77	25.8	14	3.6	4	0.3- 6.9
Prior to 1975	6.3	12	0.8	3	0.0- 2.5
Total	—	147	28.8	27	—

54. The court finds from the study immediately *supra* and from other evidence in this case that the black employees of Union Bank are not perceiving that their own employment opportunities are being unduly restricted at the bank.

55. We have examined the individual reasons for the discharges of the white and black employees of Union Bank during the period 1974-80. We have gone further and examined the employment summaries of the blacks discharged during the period. We find that the discharges of both white and black employees were justified by the bank management. We further find that the discharge of the black employee was not racially motivated but fully justified by the information appearing in their personnel files (Def. Exhs. F F(1) and F(2)).

56. Using regression analysis, a recognized statistical tool,[1] it can be statistically determined whether pay differential between blacks and whites at Union Bank is based on race or other factors. The monthly earnings of blacks and whites at year end of 1978 were subjected to a regression analysis in which the factors of race, schooling, seniority, part-time status and prior work experience were considered. The results of this analysis by Dr. Gwartney were as follows:

Variable	Mean Value		Regression Dependent Variable = Earnings (Standard Error in Parenthesis)	
	Whites	Blacks	(1)	(2)
Race (work force = 17.9% black)	0.0	1.0	-$213.35 (64.92)	-$ 4.19 (46.77)
Years of Schooling	13.5	13.1		27.51 (15.24)
B.A. Degree (1 if yes)	0.22	0.11		98.19 (69.98)
M.A. Degree (1 if yes)	0.03	0.00		135.54 (132.06)

[1] Regression analysis is widely used by scientists to measure the importance of a set of factors (independent variables) as determinants of a single dependent variable. It is fully explained in Defendant's Exhibit 50, an exhibit to the testimony of Dr. James Gwartney.

Variable	Mean Value Whites	Mean Value Blacks	Regression Dependent Variable = Earnings (Standard Error in Parenthesis) (1)	(2)
Months of Seniority	64.6	28.4		40.80 (3.93)
Part-time Work (1 if No., i.e. if full-time)	0.06	0.13		126.57 (69.48)
Months of Bank Management Exp.	2.7	0.0		83.44 (12.79)
Months of Other Management Exp.	6.0	0.0		89.73 (8.43)
Months of Computer Spec. Exp.	1.1	0.5		77.16 (18.07)
Months of Accounting Exp.	0.7	0.0		36.23 (24.07)
Months of Collector Experience	0.8	0.1		88.34 (22.29)
Months of Professional/Technical Experience	2.9	0.3		24.21 (12.99)
Y-Intercept			854.42	
R^2 (adjusted)			.02	.52
Number of Employees			402	402
Adjust B/W Earnings Ratio (%)				99.5%

57. Based upon a regression analysis and other evidence in this case, we find that the earnings of blacks and whites who have similar types of qualifications at the Union National Bank are the same. There is no discrimination between blacks and whites at the bank as far as earnings are concerned. Earnings differentials result from unequal education, seniority and prior work experience. Another factor in promotions and pay at the bank is work performance. Based on the evidence in this case, we find that bank officials have been even-handed in their application of this factor between blacks and whites. This factor is, however, difficult if not impossible to statistically evaluate.

58. From time to time the bank utilized the services of Dr. Roy C. Long, a qualified clinical psychologist, to administer psychological tests to prospective and present employees of Union National Bank. These tests were administered to both blacks and whites. As a result of the tests, Dr. Long placed the person in one of three categories: (a) recommend, (b) recommended for consideration, or (c) not recommended. Only one of the parties to this litigation was tested by Dr. Long—Melvin Paxton. He was placed in category (b). Based upon a statistical analysis of Dr. Long's test results (Def. Exh. 52) and upon Dr. Long's extensive testimony in this case, we do not find that Dr. Long's testing procedures or conclusions had a disparate impact upon blacks.

59. None of the plaintiffs or intervenors are proper representatives of any class or subclass pursuant to Rule 23, Fed.R.Civ.P.

60. On a factual basis the requirements of Rule 23(a), Fed.R.Civ.P., have not been met by the plaintiffs and intervenors.

61. On a factual basis the plaintiffs and intervenors have failed to prove a prima facie case of discrimination against the defendant bank.

62. Even assuming that plaintiffs and intervenors have made a prima facie case, the defendant has with respect to each of them articulated a legitimate, nondiscriminatory reason for its actions.

63. None of the reasons mentioned in finding No. 64 were a pretext for discrimination.

MELVIN PAXTON

1. Melvin Paxton was hired by the bank on August 14, 1975 at a salary of $400.00 per month. He was a member of the first banking class operated by Union National Bank in conjunction with the Opportunities Industrialization Center, mentioned *supra*. He was assigned to the Southwest Branch as

a teller trainee under Lloyd Walker, Branch Manager. On December 19, 1975 he was transferred to the Auto Branch Downtown. On January 1, 1976 he was given a salary increase to $435.00 per month. On March 1, 1976 he was transferred to the Medical School Branch, Wayne Greathouse, Manager.

2. Melvin Paxton was not hired as a management trainee (T. 384). He was made no promises by responsible bank officials that he would receive any training except as a teller (T. 393). Management trainees are put through a certain rotating employment routine at Union Bank. Paxton was never put through this routine (T. 362) and never was a management trainee nor was he told that he was a management trainee by bank officials.

3. In the fourth quarter of 1975 and the first quarter of 1976, Melvin Paxton had the worst outage record of any of the 60 tellers in the Union National Bank (Def. Exh. KK). His ratio to total daily difference for the two quarters was 14.25%—far in excess of any other teller in the bank. The nearest to him had a 10.24% ratio. Of the fifteen worst tellers in the bank in respect to outages, ten had a ratio between two and five percent. We find that Paxton's outage record was not only bad but exceptionally bad.

4. As a result of his bad outage record, Paxton was refused a salary increase on March 19, 1976 (Def. Exh. H).

5. On January 30, 1976 Mr. Paxton while a teller at the Downtown Auto Bank made a customer deposit of $61.00 into his own account. On February 5, 1976 and after having been advised of his January 30, 1976 error, he did the same thing with a $25.00 customer deposit. (Def. Exh. E) It is a violation of Union Bank rules for a teller to handle any transaction with his own account. To place a customer's deposit in the teller's own account is a serious infraction of bank rules (T. 462).

6. According to Mr. Paxton's last supervisor at the bank, Mr. Wayne Greathouse, Paxton's work as a teller was unsatisfactory, which evaluation was reported to the bank's personnel office (T. 650).

7. The bank was justified in refusing a pay increase to Melvin Paxton on March 19, 1976. This refusal was not based on race but on Paxton's poor performance as a teller.

8. On April 2, 1976 Mr. Paxton went on vacation and on the same date filed this lawsuit as well as a complaint with the EEOC. The bank first learned about these actions from the newspapers.

9. When Paxton returned from his vacation on April 16, 1976, Mr. Zegler, the Personnel Manager, told his supervisor to have Paxton come to Zegler's office for an interview, the purpose of which was to ascertain why Paxton had complaints against the bank. Paxton became very angry during this interview, abruptly left Zegler's office, took off his bank logo pin and threw it in the direction of Ms. Charlotte Johnson, a black employee in the personnel office. He did not return to his post as a teller at the Medical School Branch either that day or the next several days. On April 20, 1976 Zegler wrote Paxton a letter stating that the bank interpreted his actions to be a resignation.

10. The court finds that Paxton did voluntarily resign from Union National Bank and was not discharged. We further find that the resignation was in no wise the result of discriminatory action on the part of the bank. In fact, we find that the bank was very tolerant toward this man in view of his extremely bad work record and serious breach of bank rules on two occasions.

11. The court finds that Paxton's failure to receive promotions and salary increases was due solely to his poor work performance and was entirely unrelated to his race.

12. Paxton never performed the duties of branch manager at the Union National Bank, and his statement in the EEOC complaint in this respect is untrue.

KATRINA TERRY

1. Katrina Terry was hired as a Vault Clerk in the installment loan department at $400 per month on August 25, 1975. She, like Melvin Paxton, was in the first banking class

operated by Union National Bank in conjunction with the Opportunities Industrialization Center, mentioned *supra.*

2. On February 20, 1976 her division head wrote a memorandum to the Personnel Department recommending that she not be considered for promotion because of her poor attitude, procrastination in her duties, and generally poor work performance (Def. Exh. V).

3. Mrs. Aleene Giger, Installment Loan Collection Officer, also complained about the work performance of Katrina Terry in a memorandum to personnel. She criticised her lack of interest in her job, extended lunch breaks, failure to stay at her desk and answer the phone, and unauthorized visitation in other departments (Def. Exh. V). Mrs. Giger confirmed and expanded on her memorandum in testimony at the trial. In addition to the above criticisms, Mrs. Giger stated that she did a poor job at keeping the vault neat and orderly, that she misfiled documents and left collateral loose in the vault.

4. On April 17, 1976 Mr. Akers, Ms. Terry's division head, wrote the personnel office that he found it necessary to admonish Katrina Terry in "rather strong terms as the result of some things that have been going on for some time." These were enumerated as follows:

1. Taking more than allotted time for lunch;
2. Loitering outside the department entrance and in the hallway;
3. Injecting herself into a decision made by a loan officer in regard to a black female customer. The loan was being declined, and Ms. Terry went over to the loan officer's desk and asked the customer if the loan officer were giving her a hard time.

The incident enumerated in (3) was corroborated in testimony by Bob Hogan, one of the loan officers. In her own testimony Ms. Terry admitted this incident but said she was only making "a friendly comment." We find that the incident related in

paragraph (3) of the Akers' memo did occur. We further find on the basis of the memo by Akers, the Giger Memo and other evidence in the case that Katrina Terry's work performance was poor.

5. On May 4, 1976 Katrina Terry was placed on disciplinary probation because of excessive absences. The court finds that her absences were excessive and that the bank was justified in placing her on probation.

6. On July 1, 1976 Ms. Terry resigned from the bank voluntarily. The court finds that the resignation was not prompted by any discriminatory actions on the part of the bank.

7. In her testimony Ms. Terry frankly stated that she was qualified to be a loan officer at the bank "after three months in the loan vault." She also testified that she could perform the job of the personnel director, Mr. Zegler, that she was qualified to be a trust officer, and could be quickly trained to be a computer programmer. She also said that she felt she could perform the job of Mr. Herbert McAdams, Chairman of the Board, "because the higher you go the less there is to do." The thrust of Ms. Terry's testimony was that she felt the bank was remiss in failing to recognize her considerable talents during the ten months of her employment with the bank. In spite of her personal assessment of her abilities, we find nothing in her job performance record that would qualify her for advancement at the bank. In short, we find that the failure of Ms. Terry to advance in Union National Bank was due to her own poor work performance and attitude. It was entirely unrelated to her race.

GEORGE SPANN

1. George Spann was hired by the Union National Bank on August 30, 1973 as a part-time messenger in the mail room for $1.65 per hour, which was increased to $2.00 on May 1, 1974. On July 1, 1974 he was made a full-time employee in the Transit Department as Recordak operator and Branch Runner, Salary Group 4, at $350.00 per month. His salary was

increased to $395 per month on December 16, 1974 at which time he was promoted to Control Clerk, Salary Group 5. On November 16, 1975 his salary was increased to $420 per month. On March 31, 1976 Mr. Spann resigned. (Def. Exh. Y)

2. Mr. Spann's complaint at the bank was that he did not receive sufficient raises and promotions (T. 1417).

3. The personnel records at the bank reflect that on January 14, 1975 his supervisor talked to him "to make him more aware that he has now been transferred to a new position, and that he must now learn his new job." According to the supervisor, "He spends a lot of his time in the Mail Room visiting his friends, leaving work for others to do." (Def. Exh. Z)

4. On March 20, 1975 his supervisor talked to him and "told him that it will be necessary to spend more time with his present job and stay out of other departments." The supervisor made the following additional comments in a memorandum to personnel: "He still needs lots of help. He was asked if he was even interested in the job. He said he guessed so but might like something else. At this time there are no other openings for him to try." (Def. Exh. Z)

5. On June 12, 1975 Spann was the subject of the following memo from his supervisor to the personnel department:

> Once again we have had to talk with employee George Spann. The other employees who have been staying late with him are complaining that they are tired of trying to help him. He has been told that he will be left on his own after Monday June 16, 1975 to do his job, and if he is unable to do this job, then he will be dismissed.

6. On January 9, 1976 Spann was the subject of the following memo from his supervisor to personnel:

> Today I had a talk with Proof Control employee, George Spann, about the amount of time that he misses from work. He has been missing at least one to two days

per month. He calls in sick. He states that he has not been aware of the amount of time involved that he has missed.

7. During the two and one-half years that Spann was with the bank, he received four salary increases and two promotions. We find that these salary increases and promotions were more than commensurate with the quality of his work performance and that he was treated fairly by the bank both in the matter of promotions and salary increases.

8. Mr. Spann voluntarily resigned from his position at Union National Bank. His resignation was not the result of any discriminatory action on the part of the bank.

9. In his letter of resignation, Mr. Spann gave the reasons as follows: "I feel that my merit is higher than shown by my supervisor. My raises have been denied for several reasons. I have seen others that have been here shorter time than I, in my department, and salaries increased." The reasons given in this letter of resignation are not supported by the evidence in this case.

HAROLD BROWN

1. Harold Brown applied for employment at the Union Bank on September 19, 1977 and was hired as a mail clerk-messenger at $425 monthly and began work the next day. In a routine background investigation, various discrepancies were found in the information provided in his application and interview. As a result he was discharged by the bank on September 23, 1977 after working three days. (Def. Exh. Q)

2. In Mr. Brown's offer and acceptance of employment at the bank, it is stated: "We conduct a thorough background investigation of all prospective employees. This includes your credit, police and employment record. This offer is contingent upon our receiving favorable reports. Unfavorable data could cause us to withdraw this offer." (Def. Exh. Q) Brown was given the following notification pursuant to Public Act 91-581:

> This is to inform you that it is part of our procedure for employment, that an investigation may be made whereby information is obtained through personal interview with

the third party, such as family members, business associates, friends, financial sources, neighbors, or others with whom you are acquainted. This inquiry includes information as to your character, general reputation, personal characteristics, and mode of living, that may be applicable. You have the right to make a written request within a reasonable period of time for complete and accurate disclosure of any additional information concerning the nature and scope of the investigation.

He executed the following agreement:

I hereby authorize Union National Bank or its agents to conduct such an investigation in connection with my application for employment, as may be necessary in their sole discretion. I authorize persons, schools, law enforcement agencies, firms, and medical practitioners who may have information that is relevant to the investigation, to disclose it to Union National Bank or its agents, and I release for all such from any liability on account of such disclosures. I understand that any false, incomplete or any misleading information furnished by me, on this form or in connection with my application for employment, may result in the rejection of my application, or if employed, in the termination of my employment.

/s/ Harold Dominic Brown

In the application form signed by Brown, the following appears:

I authorize the Bank to investigate all statements contained in this application. It is understood and agreed that any misrepresentations by me in this application will be sufficient cause for cancellation of the application and/or for separation from the Bank's services if I have been employed.

3. An investigation by a professional investigative agency regularly retained by the bank revealed that Brown had filed a Chapter 13 proceeding in a Bankruptcy Court at Little Rock for debts in the amount of $7,125; that a debtor's arrangement had been agreed to under which Brown would pay $225 per month to discharge his debts. He defaulted on payments under this

arrangement, and the Chapter 13 protection was abrogated. He has been sued for unpaid bills and had a poor credit rating at the time of his employment.

4. When asked about his Chapter 13 petition and credit record, Brown told Mr. Zegler, the Personnel Director, that the Chapter 13 petition had been dismissed because he had satisfied all the obligations and that a suit filed by the credit union of his former employer, Westinghouse, had been satisfied. On further investigation the bank found that these representations were not true.

5. In a memorandum dated September 23, 1977, Mr. Zegler gave the following reasons for discharging Mr. Brown:

1. He had lived at three addresses not shown on his application.
2. The address given on one of his references was a vacant lot.
3. He said he had been divorced for three years. It was really two years.
4. He said he had been discharged from the Navy because of a heart murmur. The Navy said it was for "other than health reasons." His BD form 214 from the Navy did not list a reason for discharge.
5. He said he had satisfied his obligations on a 1975 bankruptcy. He had not.
6. He was sued by the credit union at Westinghouse for $5,900. No payment or arrangement for payments had been made. Harold denied having been contacted on the suit.
7. He is in debt over $14,000 with no apparent hope of repayment.

While some of the above reasons standing alone would not justify Brown's discharge, viewed cumulatively they do present ample justification for such action on the bank's part. The serious problem with Brown was his poor credit history and

involvement in bankruptcy proceedings. We find that the bank has a legitimate interest in the credit history of its employees. We further find that a bank's concern is, and should be, heightened when an employee not only has a bad credit history by misrepresents the facts concerning it to the bank.

6. We find that the bank was justified in discharging Harold Brown on September 23, 1977 and that the reasons for his discharge were totally unrelated to his race.

JERRY RILEY

1. Jerry Riley was hired by the bank as a messenger on September 22, 1976 at a salary of $400 monthly.

2. On December 31, 1976 he resigned to attend college on a full-time basis, according to his testimony. His signed resignation on file with the bank reflects that he resigned "due to family illness."

3. On July 1, 1977 he was rehired as a messenger at a salary of $425 monthly, Salary Grade 3.

4. On August 17, 1977 he placed a request for transfer to computer operator trainee.

5. On October 16, 1977 his salary was increased to $460 and on November 7, 1977 he was promoted to Control Clerk.

6. On December 8, 1977 his supervisor wrote the following memo to the Personnel Department:

> I talked to Jerry Riley tonight about his work. He is not performing to the best of his ability. He is taking too long to do ILd. On 12-7-77 after having ILd separated by banks it took him two hours to check and pack it. The same night he left the Union ILd balance sheet out of balance by writing down the wrong totals.
>
> I talked to him about learning to do some of the other jobs that is required of a control clerk. He assured me he would do his job faster and learn to do something besides ILd.

However, a subsequent evaluation on January 17, 1978 indicated that he was average on most items.

7. On May 16, 1978 he was given a salary increase of $525 and on August 4, 1978 was evaluated as doing an average job.

8. He received a salary increase to $550 on November 1, 1978 and an increase to $600 on June 16, 1979.

9. On July 20, 1979 he was evaluated as doing an above-average job.

10. On July 30, 1979 he filed an EEOC charge because he was denied promotion to head control clerk.

11. On December 19, 1979 Riley's department head, Raymond Whittier conferred with Riley about two positions under consideration. One was a control clerk on the day shift, which Riley found unacceptable because it interfered with his college schedule. He decided upon the other position and was advised that he would be moved into it as soon as he trained his replacement. He was made a computer operator trainee on March 15, 1980. On March 16, 1980 he was given a salary increase to $650 plus a 15% night differential. The control clerk is Salary Grade 7 and a computer operator frame is Grade 8.

12. On June 18, 1980 Mr. Riley filed the following charge with the EEOC:

> Since my transfer to computer operator trainee on Mar. 15 I have not received training as other trainees have. I have not received a salary increase equal to level of other trainees, I have been subjected to verbal abuse from supervisor personnel, also I have been called to listen to performance evaluation where others have not, I feel that this harassment has been caused by my 1st charge (retaliation).

13. On July 11, 1980 Riley's supervisor Whittier had a corrective counselling session with Riley. A memorandum of this conference contains the following critical comments:

> I met with subject employee the afternoon of Friday, June 13. Judy Austin sat in.

The subject is a Trainee Computer Operator at this time. Based on the evaluations of subject's immediate supervisors, he is not presently meeting the standards for progress as a Trainee. It was the purpose of this meeting to make the subject aware of these deficiencies.

I reviewed a number of items with the subject. I mentioned that several weeks ago, approximately one month, it was observed that he was lax in reporting for work at his appointed time. I indicated though, that this had been improved and that currently he was reporting to work on time and working his normal hours.

I indicated that while his main duties involved on the job training (OJT) it was necessary for him to spend any idle time he might have observing the other operators performing their duties. I indicated that it [had] been noted that he was absent for extended periods of time (up to two hours) without any permission from the Computer Room where he should have been observing the operators in action. There are periods of time during the processing night that it is not possible for him to actually operate the computer because of the necessities of production, but that at all times he can benefit from close observation. I indicated that on more than one occasion he had been observed "visiting" in another department during these absenses and that this could not continue if he was to make any progress at all in his training. I also noted that it seemed that although he took extensive notes as to his procedures, he did not refer to these notes when actually asked to perform and required frequent prompting by his trainers.

In short, I indicated that at this point, after some three months as a Trainee, he has not progressed to the point that we thought was reasonable. It appeared to us that regardless of the conditions that existed for his training that he should be further along in exhibiting more independent action that he had been able to.

14. One of Riley's complaints was that two whites, Keith Gardner and Dave Newby, had been moved ahead of him and

placed directly into computer operator positions. However, Gardner had three prior years of computer experience (two as a computer operator in another bank). Newby had five prior years of experience as a computer operator and is a computer science major at UALR. We find these complaints to be unjustified. There were also complaints about comparable progress of David New and Chuck Howland, both computer science college majors, which we find unjustified.

15. In Mr. Riley's department (computer operations) there are three supervisory employees and twenty-seven non-supervisory, for a total staff of thirty. Nine of the non-supervisory employees are black. One of the supervisors (Mike Mothershed) is black. Exactly one-third of the non-supervisory employees are black and one-third of the supervisors are black.

16. In September 16, 1980 Riley was made a computer operator, and on February 1, 1981 he was given a salary increase to $800 monthly, salary group 11.

17. To recapitulate, since Mr. Riley was rehired by the bank on July 1, 1977, less than four years ago, he has received three promotions and eight salary increases. He is presently employed as a computer operator.

18. He did not progress as fast in learning his job as a computer operator as two whites (Chuck Howland and David New) or another black (Bobby Scott) during the training period as a computer operator trainee (see testimony of Mike Mothershed).

19. We find no credible evidence that Jerry Riley was subjected to racial discrimination at this bank as far as promotions and salary increases are concerned.

PHYLLIS MOSLEY

1. Phyllis Mosley was employed by Union Bank as a file clerk at $425.00 monthly. She was promoted to Junior Telephone Clerk on August 21, 1977 and on October 16, 1977 was given a $500 salary increase. She was given additional salary increases of $35 monthly on January 1, 1978, April 1, 1978 and March 16, 1979.

2. On March 29, 1979 bank statements were late and all file clerks and telephone operators stayed late to process them. Ms. Mosley told her supervisor that she had to catch a bus that was leaving at 5:25 p.m. Permission was refused by her supervisor, who told Ms. Mosley that she knew she would have to work late and should have made arrangements in advance for transportation. In spite of a direct order from her supervisor, Ms. Mosley left the bank and went home. Her explanation was that she lived twelve miles from Little Rock and the bus she left to catch was the last one available.

3. On Monday, April 2, 1979 Mr. Zegler, the personnel director, called Ms. Mosley to his office for a conference in regard to the March 29th incident. He advised her that her transportation was her problem and that the nature of the work in her area, as well as many other areas in the bank, necessitated working past 5:30 on occasion. She was told that if she ever again refused a reasonable order from her supervisor, she would be dismissed. (Def. Exh. A)

4. On this same day, April 2, 1979, Ms. Mosley again refused to obey a direct order of her supervisor. April 2nd was a commercial statement day and the end of the quarter for savings. It is one of the four heaviest days for the bank during the entire year. Again Ms. Mosley told her supervisor that she could not work past 5:25 p.m. and was going to leave. She was given a direct order to stay by her supervisor, which she deliberately disobeyed. She was then discharged by her supervisor (Def. Exh. M).

5. Ms. Phyllis Mosley was discharged for failing to obey a direct order of her supervisor on two occasions, after having been warned of the consequences of such refusal after the first occurrence. Race played no part in the termination of Ms. Mosley.

CONCLUSIONS OF LAW

In *Texas Department of Community Affairs v. Burdine*, ____ U.S. ____, 101 S.Ct. 1089, 68 L.Ed.2d ____, decided on March 4, 1981, the Supreme Court approved the basic allocation of burdens and order of proof in a Title VII case as defined

in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. These procedures are also applicable to disparate treatment claims brought pursuant to 42 U.S.C. § 1981. *Kenyatta v. Bookey Packing Co.,* 649 F.2d 552 (8th Cir. 1981).

In the case at bar, the plaintiffs and intervenors have utterly failed to prove a prima facie case of discrimination. Their own testimony impels an opposite conclusion. Assuming, however, that the plaintiffs and intervenors had made a prima facie case, the defendant has more than sustained its burden of articulating "some legitimate nondiscriminatory reason" for its employment decisions not only in regard to these six plaintiffs and intervenors but as to all other employees whose names have been suggested as putative discriminatees. We use the word "suggested" advisedly because in terms of other employees besides the six plaintiffs and intervenors there are only unsubstantiated and nonspecific charges of discrimination based on gossip and hearsay. If there is any proof in this record that the bank's personnel actions were a pretext for racial discrimination, we have failed to find it.

In the *Burdine* case, *supra* the Supreme Court makes it perfectly clear that, after the various shifts in the burden of going forward with the evidence, the ultimate burden of both proof and persuasion lies with the plaintiff to establish the existence of unlawful discrimination by a preponderance of the evidence. Clearly the plaintiffs and intervenors have failed to sustain this ultimate burden of proof or persuasion.

With regard to the class action allegations, the plaintiff in a purported class action must prove the following by a preponderance of the evidence: (1) the defendant's employment practices and procedures discriminated against members of a protected class; (2) the plaintiff is a member of the protected class; and (3) all the requirements of Rule 23(a) and one category prescribed in Rule 23(b) have been satisfied. *East Texas Motor Freight v. Rodriquez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). These plaintiffs and intervenors fail at the very outset because they have failed to prove employment practices and procedures of Union National Bank which discriminate against any class of their employees. It follows that these plaintiffs and intervenors could not be members of such a class. The requirements of Rule 23(a) have not been met. "Title VII plaintiffs are not exempted from the prerequisites of Rule 23(a). *Taylor v. Safeway Stores,* 524 F.2d 263, 269-70 (10th Cir. 1975). To satisfy the requirements of Rule 23, there must be a class of individuals raising the same claims or defenses too numerous for joinder and the plaintiff must be a representative of that class with a claim 'typical of the claims or defenses of the class' .... As stated, the burden of establishing these requirements rested on the plaintiff." *Doctor v. Seaboard Coast Line R. Co.,* 540 F.2d 699, 706-707 (4th Cir. 1976).

The four requisites of Rule 23(a) are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. We doubt that any of these requirements have been met. With regard to numerosity, there are presently 74 black employees at the bank out of a work force of 432. With the exception of intervenors Riley and Scott (who settled his case on the eve of trial), no present black employees of Union National Bank testified that the bank had discriminated against them. A number of blacks presently employed at the bank gave testimony very favorable to the bank on the issue of discrimination—Bill Pierce, Mike Mothershed, Mildred Hall, Charlotte Johnson and Shirley Clingman. There hardly appears to be any great number of blacks at the bank who desire these plaintiffs to represent them in a class action or who would profit from such representation. In fact very few employees

purportedly subject to discrimination have been identified. When they have been identified, the basis for the discrimination charge has been exploded either by other testimony, bank records, or testimony from the alleged discriminatees themselves. "It seems reasonable to conclude that the court will be in a better position to apply the requirement [numerosity] after it has performed the analysis under paragraphs (a)(2) through (4)." *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D.Cal. 1977). If this procedure is followed herein, the numbers just about disappear.

Are there questions of law or fact common to the class these plaintiffs and intervenors seek to represent? Such has not been established. Paxton, the main plaintiff, resigned against a background of poor work performance and flagrant violation of bank rules. The other plaintiff, Brown, was fired after three days for misrepresentation in his employment application. One intervenor was fired for leaving her job on two successive work days in express disregard of her supervisor's orders. Two intervenors resigned after compiling a poor work record at the bank. One is still employed there. There is very little commonality in fact or law if we compare these individual cases with each other. We can find in this record little basis for holding that there is commonality with other discharge cases. We have examined the discharge records of the bank introduced in evidence in this case. Discharges were principally for excessive overdrafts, misappropriation of funds, absenteeism and tardiness, misconduct, inefficiency, and poor performance. The discharge cases—Brown and Mosley—would seem to have little or nothing in common with the other discharges. Paxton, Spann and Terry resigned. People resign employment for a multitude of reasons. The proof has not been forthcoming that they have issues in law or fact common to other blacks who may have resigned from the bank. Spann and Terry claim that they resigned from the bank because of discrimination in promotions, but the evidence fails to substantiate this charge as to them or other black bank employees. The elements of commonality are summarized very well in *Harriss v. Pan American World Airways, Inc., supra* at p. 41. We find the elements there summarized to be lacking in the case at bar.

Proof of typicality is also lacking. "The typicality requirement of Rule 23(a)(3) obligates the class representative to at least demonstrate that there are other members of the class who have similar grievances." *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975). It must be concluded from the findings of fact set forth above that the requirement of typicality has not been met. It is not necessary to discuss the fourth requirement of Rule 23(a). It is hardly necessary to inquire as to whether these plaintiffs and intervenors could adequately represent a class when their proof has failed to delineate any class who should be represented.

In accordance with the above findings of fact and conclusions of law, judgment will be entered in favor of the defendant in these consolidated cases both as to the individual claims and the class allegations.

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 81-1650

MELVIN PAXTON, JR., *et al*,
Appellants,

vs.

UNION NATIONAL BANK, etc.,
Appellee.

No. 81-1656

HAROLD DOMINIC BROWN,
Appellant,

vs.

UNION NATIONAL BANK, etc.,
Appellee.

No. 81-1657

MELVIN PAXTON, JR., *et al.*
Appellees,

vs.

UNION NATIONAL BANK, etc.,
Appellant.

(Filed: September 10, 1982)

These appeals from the United States District Court for the Eastern District of Arkansas were considered on a designated

record from the United States District Court and on briefs of the respective parties and were aruged (sic) by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in these causes be, and the same is hereby, affirmed in part, reversed in part and remanded to the said District Court to award appropriate relief to Mosley, Riley and to the promotion subclass in accordance with the opinion of this Court.

It is further ordered that costs shall be taxed to the appellee.

September 10, 1982

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term 1982

Nos. 81-1650/1656/1657

MELVIN PAXTON, JR.; and
KATRINA E. TERRY; PHYLLIS MOSLEY;
JERRY RILEY; GEORGE SPANN, *et al*,
Appellants,

vs.

UNION NATIONAL BANK,
a corporation, *et al*,
Appellees.

Appeals from the United States District Court for the Eastern District of Arkansas

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The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 27, 1982

Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,

Petitioner,

v.

MELVIN PAXTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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No. 82-1220

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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UNION NATIONAL BANK OF LITTLE ROCK,

Petitioner,

v.

MELVIN PAXTON, et al.

Respondents.

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case concerns an appellate court's proper exercise of its powers to review a district court decision based on incorrect legal principles and clearly erroneous findings of fact.

In 1976, respondent Melvin Paxton filed a class action lawsuit against Union National Bank alleging race discrimination in hiring, testing procedures, promotions, discharges, job assignments, compensation and other terms and conditions of employment. This case was consolidated with two other lawsuits and five additional black persons were allowed to intervene. The plaintiffs and intervenors moved to certify the consolidated cases as a class action pursuant to Rule 23, Fed. R. Civ. P. The district court began an evidentiary hearing on the certification issue but later merged the certification hearing with the trial on the merits. The combined hearings took place in two parts - April, 1980 and August, 1980 - and continued for fifteen days before the original district court judge. In October, 1980 the original

judge recused himself. The case was reassigned and the successor judge informed the parties that he would not rehear the witnesses from the first fifteen days of trial testimony. The plaintiffs had presented the bulk of their case in chief before the original judge. This included the testimony of the two named plaintiffs and three of the four[1/] intervenors with live controversies. The trial resumed in April, 1981 and continued for eleven additional days. The plaintiffs had generally proceeded on a class-wide basis. The defendant had then fully presented its defense as to all class and individual claims. At the close of the evidence, the district court found that there was no class discrimination by the defendant Union

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1/ One of the original five intervenors had settled his case prior to trial.

National Bank. The court therefore reasoned that class certification was inappropriate:

> These plaintiffs and intervenors fail at the very outset because they have failed to prove employment practices and procedures of Union National Bank which discriminate against any class of their employees. It follows that these plaintiffs and intervenors could not be members of such a class.

Appendix B to Petition, p. 98a. The Eighth Circuit reversed the district court for its failure to certify any class because its reliance on the merits of the class claims improperly influenced the decision on the class certification and resulted in the use of an incorrect legal standard. Further, the district court's erroneous conclusions on the merits caused it not to give proper consideration to the requirements of Rule 23, Fed. R. Civ. P. The Eighth Circuit also reversed the district court

on the merits of the promotional[2/] claims because the findings were clearly erroneous.

REASONS FOR DENYING THE WRIT

The questions presented challenge the Eighth Circuit's exercise of its appellate jurisdiction. The petition should be denied because it presents no conflict of decisions among the circuits and because it presents no conflict with the decisions of this Court. Moreover, The Eighth Circuit opinion raises no important or new issues of law, but rather applies well-established principles from this Court's decisions in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and

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2/ The court of appeals also found that a class of discharged employees should have been properly certified, but did not set aside the finding of no discrimination with respect to that class.

Pullman-Standard v. Swint, 72 L.Ed.2d 66 (1982), to a district court's flawed legal analysis of a complex factual situation.

ARGUMENT

I.

THE EIGHTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN PULLMAN-STANDARD V. SWINT

Petitioner asks this Court to review whether or not the Eighth Circuit paid "lip service" only to the clearly erroneous rule. It does not claim that the Eighth Circuit was unaware of Pullman or that it, as the Fifth Circuit had in Pullman, utilized the "ultimate fact" analysis to reverse some of the findings of the district court. Rather, petitioner's argument rests upon speculation concerning the possibility that the rule might have been

avoided.[3/] This assertion is not supported by the record.

The court of appeals acted well within its sphere to refrain from substituting its judgment as to disputed facts and correctly exercised its supervisory functions. It properly stated and applied the appropriate rule of law and assessed the case as follows:

> After a careful review of the 6000 page transcript comprising this record on appeal, we are left with the firm conviction that the district court erred in holding that the bank did not discriminate against black employees with respect to promotions. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)

Appendix A to Petition, p. 17a. The court

3/ Similarly, the petitioner suggests that the Eighth Circuit, though acknowledging the proper standard, did not use the abuse of discretion standard in reviewing the decision on class certification.

thus reviewed the "entire evidence"[4/] before concluding that "a mistake [had] been committed." United States v. United States Gypsum Co., 333 U.S. 364 (1948). Doubts concerning the Eighth Circuit's application of the correct standard are dispelled upon review of its treatment of the various factual issues. Such a review demonstrates that the court of appeals gave due deference to the findings of the district court and did not engage in an independent evaluation. An unambiguous example involved the lead plaintiff, Melvin Paxton. Shortly after filing his charge of discrimination, Paxton was called into the office of the personnel director and questioned at length about the reasons for

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4/ The petitioner apparently equates a review of the record with independent fact-finding. In fact, one could hardly consider the entire evidence without reviewing the record.

his charge. The facts surrounding his subsequent resignation were disputed and the court of appeals held:

> While we do not believe that the record supports the view that Paxton was an unsatisfactory employee and while we believe that a factfinder could have found that Paxton was constructively discharged, we are unable to say that the trial court's finding with respect to the alleged discharge is clearly erroneous. We likewise hold that the trial court's finding that Paxton was not hired as a management trainee was not clearly erroneous.

Appendix A to Petition, p. 34a. Further evidence that the court of appeals applied the correct standard include:

a) Although the Eighth Circuit found no support for an alleged explanation 5/ for the higher discharge rate of blacks, it affirmed the

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5/ "We find no support in the record for the district court's observation that more black employees in the target group were discharged than white employees because the black persons hired were less qualified than their white counterparts." Appendix A to Petition, p. 24a n.22.

finding that the discharge class had not been discriminated against.

b) Although the Eighth Circuit found that the district court erred in characterizing Jerry Riley's promotional claim to computer operator trainee 6/ and further found that Riley was qualified and had made out a prima facie case of discrimination, it affirmed the district court's finding of non-discrimination with respect to this claim and with respect to his claim of discrimination in promotion from trainee to computer operator.

In sum, after considering all the evidence the court of appeals was diligent in not reversing findings which were in any way supported by the record. See also Appendix A to Petition, p. 34a (findings as to three other individuals not clearly erroneous)

6/ "The district court characterized Riley's claim as being much broader involving all persons hired as computer operators after August, 1977. The district court clearly erred in doing so." Appendix A to Petition, p. 28a n.24.

The petitioner asserts a further conflict with Pullman on the class certification issue by claiming that the court of appeals did not "give proper deference to the district court's findings of fact that the named parties could not represent the class." Bank's Petition, pp. 15-16. The district court, however, had allowed its erroneous view of the merits to affect its consideration of the class issue and did not make proper findings on the elements of a class certification. For example, the court declined to make any finding with respect to the adequacy of representation requirement because of its belief that no class discrimination had been shown:

> It is not necessary to discuss the fourth requirement of Rule 23(a). It is hardly necessary to inquire as to whether these plaintiffs and intervenors

> could adequately represent a class when their proof has failed to delineate any class who should be represented.

Appendix B to Petition, p. 100a. The district court simply had no factual or legal basis for its failure to certify the class.

The Eighth Circuit thereupon properly determined that the claims of the plaintiffs were typical, for here the "record permits only one resolution of [that] factual issue." Pullman, supra, 72 L.Ed.2d at 82. Because the district court applied an erroneous view of the law on class certification, it completely ignored the facts which demonstrated the typicality of plaintiffs' claims. The evidence, when properly considered, showed that there were other members of the class with similar grievances. Appendix A to Petition, pp. 14a-15a. Under the facts of this case, a

remand was not necessary.[7/] Even if the district court had initially made a contrary finding using the correct legal principles, the record would not have supported such a finding.

II.

IN CONCLUDING THAT THE BANK HAD DISCRIMINATED IN PROMOTIONS, THE EIGHTH CIRCUIT APPLIED PRINCIPLES ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY OTHER CIRCUITS

The petitioner argues, alternatively,

7/ The district court did not actually make a finding on the requirement of typicality. Even if it had, such a finding could not have stood because of the erroneous view of the law applied. Pullman-Standard v. Swint, supra, 72 L.Ed.2d at 79. See also Kelly v. Southern Pacific Co., 419 U.S. 318, 323 (1974); United States v. General Motors Corp., 384 U.S. 127, 141 n.6 (1966). The petitioner apparently believes that the district court should have a chance to make a finding in petitioner's favor under the correct legal standard. There are, however, no facts cited by the petitioner or by the district court or contained in the record which support a finding other than that reached by the Eighth Circuit. Any other finding would have thus been clearly erroneous.

that the decision by the district court was not, in fact,[8/] clearly erroneous. Central to this theme is a criticism of the court of appeals treatment of certain statistical evidence. More specifically, the petitioner questions the Eighth Circuit's crediting the evidence of significant disparities within the bank's workforce -- upper level jobs being held almost exclusively by white persons. However, the court of appeals merely recognized, as this Court has consistently observed, that gross statistical disparaties in a workforce during the relevant time period may alone constitute a prima facie case of

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8/ The petitioner would thrust this Court in the position of reviewing the entire evidence again to determine if a clearly erroneous holding were justified. The arguments of the amici also generally address the overall merits of the claims of discrimination.

discrimination. Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 339 n.20. This fundamental concept had been uniformly recognized by courts of appeal, but completely ignored by the district court. See, e.g., Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980), cert. denied, 74 L.Ed.2d U.S. 277 (1982); EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981), cert. denied, 74 L.Ed.2d 186 (1982); Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980). The district court compounded its error by ignoring other indicia of discrimination which have traditionally been relied upon by courts. In addition to the gross statistical disparaties, the following evidence was presented by plaintiffs

in support of the allegations of discrimination:

a) A showing that the bank had a history of discrimination and that the bank hired very few black persons prior to 1973. See, e.g., Hazelwood School District v. United States, supra, 433 U.S. at 309, n.15; Pettway v. America Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

b) A showing that the bank did not post notice of vacancies and recruitment was by word-of-mouth until at least 1979 when an incomplete, and often untimely, system was instituted. See, e.g., Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); U.S. v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).

c) A showing that promotional decisions were controlled by whites who used subjective criteria in selecting individuals for promotion. See, e.g., Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Reed v. Arlington Hotel Co., 476 F.2d 721

(8th Cir.) cert. denied, 414 U.S. 854 (1973); Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977).

d) A showing that acts of racism in the bank were not dealt with firmly and fairly. See, e.g., Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Williams v. Owens-Illinois, 469 F. Supp. 70 (N.D. Cal. 1981), aff'd in relevant part, 665 F.2d 918 (1982), cert. denied, 74 L.Ed.2d 283 (1982).

Appendix A to Petition, pp. 17a-18a. The plaintiffs also showed that the affirmative action program had not been effectively communicated to all supervisors and that adherence to the policy was not mandatory on top management. The combination of all these factors had a devastating effect on the promotional opportunities of blacks at Union National Bank. The court of appeals summarized the almost total exclusion of blacks in upper level positions:

> At the time of trial, all but one of the twenty-five vice presidents and assistant vice presidents were white. All division heads were white, as were fifty-four of the fifty-six persons having hiring or firing authority at the bank. Seventy-seven of eighty bank officers were white, and twelve of the thirteen branch banks were managed by white employees. No black employee was promoted to the position of teller until after this action was commenced and only one black had been appointed a senior teller by the time the trial occurred.

Appendix A to Petition, pp. 19a-20a.

The petitioner attempts to suggest that there is a possible conflict with this Court's decision in Hazelwood School District v. United States, supra, by alluding to certain unspecified "special qualifications." However, the record reveals that there were no discernible objective qualifications for promotion within the bank. The one "qualification"

most seriously suggested[9/] by the bank was educational attainment. The evidence showed that there was no significant difference[10/] between the educational attainment of blacks and that of whites within the bank's workforce.

9/ The bank would not actually claim that any particular educational level was a requirement for promotion or for hire. There was no evidence presented to demonstrate that any such alleged qualification was job related under the standards set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

10/ The average educational level of blacks was 13.1 years while that of whites was 13.5 years.

In sum, this case presents no conflict with Hazelwood because there are no "special qualifications" identified by the petitioner or revealed in the record.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

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No. 82-1220

UNION NATIONAL BANK OF LITTLE ROCK,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONER

The respondents' contention that the petition does not present questions worthy of this Court's review is not well-founded. The proper scope of appellate review may not be a question *dividing* appellate courts. Respondents' point that no conflict exists among the circuits, therefore, is inapposite. Indeed, the heavy criticism directed toward this trend shows that it is generally followed by appellate courts, and thus presents this Court with an important issue. Moreover, the respondents are unwarranted in their claims that the decision below does not conflict with decisions of this Court. In particular, the court below, by independently reviewing the facts, disregards this Court's decisions defining the proper scope of appellate review. *See Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982). And, the appellate court's use of employment

statistics, undifferentiated by job skills, conflicts with this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

A. The Court Below Engaged in Unwarranted Fact Review.

The Rules of Civil Procedure make it clear that appellate courts are bound to accept the findings of fact of district courts unless those findings are "clearly erroneous". Fed.R.Civ.P. 52(a). The "clearly erroneous" rule was simply stated by this Court in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). Similarly, appellate courts may not set aside a district court's discretionary decision unless the decision is an abuse of discretion. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981), this Court held that "the Court of Appeals seems to have lost sight of this rule and substituted its own judgment for that of the District Court." Failure to follow these standards, commentators warn, leads to increased appellate caseloads, disrespect for the judicial system, and an inefficient allocation of judicial responsibilities. *Cf. KCST-TV v. Federal Communications Commission*, No. 81-2265 (D.C. Cir., Jan. 25, 1983).[1]

A review of the treatment of the facts by the court below here confirms the conclusion that it did not follow these proper standards of review, notwithstanding its affirmance in part of the district court's findings.[2] The appellate court found that

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[1] *KCST-TV v. FCC, supra*, involved judicial review of administrative action under 5 U.S.C. § 706(2)(A) (1976) (abuse of discretion standard). Judge Scalia, in dissent, criticized his colleagues and recognized the self-imposed dilemma of appellate courts when they engage in independent review of facts and discretionary decisions:

> I believe that our readiness to entertain challenges of this sort, and to require the type of "fine tuning" the majority demands, is one of the factors contributing *to regulatory delay and to the increasing caseload of the courts.*

KCST-TV, supra, slip. op. at 1 (Scalia, J., dissenting) (emphasis added).

[2] The fact that the appellate court affirmed some of the district court's findings can hardly show that the court properly overturned others. Rather it tends to show that the court below undertook independent redetermination of all of the district court's findings, contrary to Rule 52(a), and this Court's

(*footnote continues*)

intervenor Mosely had been discriminatorily discharged. In contrast, the district court found that Mosely was discharged because she had twice failed to follow a reasonable order, an action expressly prohibited in the bank's personnel manual.[3] Similarly, the appellate court found intervenor Riley's testimony credible, in disregard of the credibility determinations made by the district court judge. *See* Pet. at 3. Finally, the appellate court found the receipt of unemployment compensation by discharged employees to be probative of racial animus; the district court made no finding of the relevance of unemployment compensation.

Respondents, however, assert that the appellate court's upholding of some of the district court's findings of fact is proof of their claim that *all* facts were given the benefit of the Rule 52(a) and abuse of discretion standards of review.[4] In so

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(*footnote continued*)

decisions. Despite the respondents' suggestion to the contrary, Brief in Opp. at 14 n.8, this Court need not review all of the evidence presented below to conclude that the appellate court independently considered the facts on appeal. This conclusion is instead inescapable from a comparison of the appellate opinion and the opinion of the district court.

[3] A comparison of the other facts comprising the appellate court's findings on the discharge claim included:

> The plaintiffs established a prima facie case of racial discrimination regarding the bank's discharge of black employees. They did so by proving a history of discrimination in the bank's employment practices, by introducing statistical evidence that showed that blacks with less than two years of service were discharged at more than twice the rate of white employees in the same group. . . .

Pet. App. A at 24a-25a. The district court's findings of fact, on all counts, are to the contrary. *See* Pet. App. B at 81a, 96a.

[4] A review of the appellate court's *affirmance* of one of the district court's findings demonstrates the weakness of respondents' claim. The appellate court accepted the district court's finding that petitioner had articulated a legitimate, non-discriminatory explanation for its failure to promote intervenor Riley. Pet. App. A at 27a (promotion of more qualified employee). *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Notwithstanding this affirmance, the appellate court then found that the district court's ruling of no discrimination was "clearly erroneous." The failure of the appellate court to give effect to its affirmance of the district court's

(*footnote continues*)

limiting their opposition to this narrow point, respondents fail to consider the type of appellate review which the court below clearly engaged in—review that

> strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Pullman-Standard v. Swint, 102 S. Ct. at 1791.

This "independent consideration" of the facts is evidence of the widening scope of appellate review. This Court's consideration is necessary to control this trend, and the adverse consequences associated with it.

B. The Respondents' Arguments Flout the Actual Decision of this Court in *Hazelwood*.

Respondents maintain that the appellate court correctly relied upon a gross statistical analysis in concluding that the district court had clearly erred in finding that the petitioner had not discriminated in promotions. And the respondents further suggest that the district court "compounded" its erroneous holding by ignoring other evidence of discriminatory intent. Respondents' position proceeds not only upon a misunderstanding of this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), but, indeed, amounts to a contention which is precisely contrary to this Court's actual decision in the *Hazelwood* case.

The appellate court's analysis of the promotional subclass claim focused on statistics reflecting only a fragment of the petitioner's entire work force. According to the appellate court, the bank's policy of promoting from within allowed the court to use the bank's *internal* labor force as the basic labor pool from which to draw statistical comparisons. Upon finding that blacks within the bank received a small percentage of promotions to

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(*footnote continued*)

finding under *Burdine, supra*, when it then imposed liability upon the petitioner for failure to promote Riley, belies complete adherance to the requirements of Rule 52(a).

the bank's three highest salaried positions, the appellate court drew an inference of discrimination. *See* Pet. App. A at 19a.[5]

In support of the decision below, respondents would have this Court accept the appellate court's assumption that *all* of petitioner's employees were equally qualified for the highest level salaried positions. This position is clearly the opposite of this Court's holding in *Hazelwood* that when "special qualifications" are required for the promotion in question, gross statistical analysis is inappropriate.[6] Moreover, respondents' position imposes a self-defeating standard upon employers with affirmative action programs; the decision below forces employers to consider and exceed their own affirmative hiring accomplishments when making promotional decisions.[7]

Respondents also state that the district court's failure to find discrimination in promotion was enhanced by its failure to recognize other indicia of discrimination. Respondents' statement, however, ignores the district court's findings of fact which support its ruling. The district court considered a number of factors important in its finding that there was no "intent" to discriminate; including (1) the bank's active and successful

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[5] The district court had considered statistics comparing the expected number of promotions received by blacks to the observed number of promotions received by blacks; in every year but 1978, blacks were promoted at a considerably higher rate than would have been expected. Pet. App. B. at 69a-70a.

[6] As this Court held in *Hazelwood*, the proper statistical pool for teaching positions included only those persons with teaching skills. The proper pool for statistical analysis of promotions to the bank's highest salaried positions, therefore, is the pool comprised of those persons with the skills needed for those positions.

[7] Respondents also mistakenly represent that petitioner admits that the district court's decision was, in part, clearly erroneous. Brief in Opp. at 13-14. It is petitioner's position that the appellate court's decision conflicts with many of this Court's decisions precisely because of the appellate court's failure to limit the scope of its review. For example, the appellate court's finding that petitioner had a policy of promoting from within was a fact not found by the district court. This finding allowed the appellate court to apply the internal work force statistical comparision, and to disregard the district court's statistical analysis. Pet. App. A at 19a. *See also* Arkansas State Chamber of Commerce and Associated Industries of Arkansas, Inc., Amici Curiae Brief at 11-14.

affirmative action plan, (2) its role in training minorities for the banking profession, and (3) statistics demonstrating the over-representation of blacks in all levels of the bank's work force. Contrary to the respondents' suggestion that petitioner's actions had a "devastating effect on the promotional opportunities of blacks," Brief in Opp. at 17, the district court's findings of fact demonstrate the bank's intent to facilitate the career advancement of its black employees, and the success of the bank in that effort.

CONCLUSION

Review by this Court of the decision below is necessary to curtail the growing trend of appellate courts to undertake independent review of findings of fact and discretionary decisions. Direction is also needed from this Court so that appellate courts will correctly analyze employment statistics without disturbing the affirmative action objectives of Title VII.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the

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October Term, 1982

Union National Bank of Little Rock ..... *Petitioner*

V.

Melvin Paxton, et al. ..... *Respondents*

AMICI CURIAE
BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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AMICI CURIAE
BRIEF IN SUPPORT OF
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

*INTEREST OF AMICI CURIAE**

The Arkansas State Chamber of Commerce (ASCC) and Associated Industries of Arkansas, Inc. (AIA) fully adopt the arguments and views advanced by Petitioner, Union National Bank. This *amicus* brief, supplemental by design, confines its argument to those legal principles implicit within the Eighth Circuit panel's opinion that have general applicability to all employers.

The ASCC represents the 1,421 companies comprising its membership in matters of concern to the business community. The AIA performs the same function for 626 companies that make up its membership.

*The parties' letters of consent to the filing of this brief were filed with the Clerk by letter of counsel for amici curiae dated January 21, 1983.

These organizations and their members are gravely concerned about the impact of the panel's decision in this matter as legal precedent for all employers. They are particularly alarmed by the panel's holding governing the determination of the pool of qualified individuals in the relevant labor market for promotions and the burden of proof relative to that determination. They are further concerned about the panel's failure to require accepted tests for statistical significance in determining the evidentiary value of numerical disparities. They are also apprehensive about the panel's seeming disregard of the existence of an aggressive affirmative action plan in determining whether there was intentional discrimination. Finally, they are greatly disturbed by the panel's apparent willingness to grant what was in effect a trial *de novo* at the appellate level particularly since the panel seemed more concerned with erroneous findings of fact than with erroneous conclusions of law.

As will be developed below, it is the position of the ASCC and AIA that these issues are of extraordinary concern to their members and the business community at large and that the panel's rulings are in substantial contravention of the established legal precedent in those areas of the law. Therefore, it is submitted that Certiorari should be granted and the panel's decision reversed for the reasons stated below.

ARGUMENT

I. *THIS IS A DISPARATE TREATMENT CASE*

The trial court and the Eighth Circuit panel herein properly characterized this action as a disparate treatment case. Essentially, disparate treatment analysis is designed to provide redress for minority employees who are treated differently than similarly situated white employees. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Disparate impact analysis, on the other hand, is specifically designed to provide a remedy under the Act for minority employees adversely affected by an employer's across-the-board application of practices, procedures or tests, neutral on their face or even neutral in terms of intent, that operate to perpetuate the effects of past discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). In a disparate impact case the plaintiff has the initial burden of proving that the defendant's facially neutral policy or practice has a substantial impact upon members of a protected class. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) and *McCosh v. City of Grand Forks*, 628 F.2d 1058, 1061-62 (8th Cir. 1980). The unstated, yet implicit, assumption here is that the plaintiff must first specifically identify the facially neutral policy at issue. The Eighth Circuit recently affirmed this imminently logical precept in *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981). "To establish a *prima facie* case under the *Griggs* theory of disparate impact, an employee must, *as a threshold matter*, point to a facially neutral employment practice or criteria

that operates in a discriminatory manner." *Id.*, (emphasis added) [1]

The language of *Harris* is clear and unambiguous. The writers of this *amicus* brief were, therefore, surprised and somewhat dismayed by the following statement:

> An argument can be made that the promotion class claims should have been decided under the disparate impact theory. As we detail, *infra*, the plaintiffs proved that the racial composition of the bank's workforce at most above-entry levels does not reflect the composition of available qualified persons in the relevant labor pool. The court could have concluded from this that the sum of the defendant's promotion methods, although not administered with a discriminatory intent, impacted more heavily on blacks in the bank's workforce. The bank would have then had to show that the disparate results were attributable to identifiable, neutral personnel practices that were necessary to its business.

Paxton v. Union National Bank, Nos. 81-1650, 81-1656, and 81-1657 (8th Cir. Slip. Op., September 10, 1982) at 4n. 3, hereinafter cited as "O. at ____." (citations omitted) The most objectionable aspect of this statement is that it wreaks havoc

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[1]Other Circuit Courts of Appeal have also adopted this seemingly self-evident, yet apparently controversial, precept. See, e.g., *Mortensen v. Callaway*, 672 F.2d, 822, 824 (10th Cir. 1982), "Mortensen also claims she proved a *prima facie* case of disparate impact. To do so, she needed to show that the Army utilized employment practices that, while facially neutral in their treatment of different groups, had a discriminatory effect or impact on a particular group. But while Mortensen introduced statistics showing a lack of women supervisors . . . , she has not pointed to any employment practice that, neutral on its face, has caused women not to be promoted to supervisory positions." (citations omitted); *Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981), "Once plaintiffs have shown the *existence* and impact of such a practice, which constitutes a *prima facie* case, the employer will be held liable unless the practice can be justified by 'business necessity'. " (emphasis added); and, *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982), "A *prima facie* case is shown by *identification* of a neutral employment practice coupled with proof of its discriminatory impact on the employer's workforce." (Emphasis added)

with the standards and burdens of proof already prescribed by this Court. In essence, the Eighth Circuit panel indicates that a Title VII or §1981 defendant must assist the plaintiff by indentifying the facially neutral practice[s] impacting upon a protected minority. The burden is completely reversed. This is totally illogical and certainly contrary to the spirit if not the letter of this Court's holdings in *Griggs*, *Albemarle*, and *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). For example, it would be patently illogical to assume that this Court would mandate "business necessity" as the exclusive defense, *Albemarle, supra*, 422 U.S. at 430-36, unless it intended for a defendant to receive complete and timely notice of the practice at issue. Certainly a defendant must be aware of the challenged practice before he can validate it, see e.g., *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 801 (5th Cir. 1982).

The second objectionable aspect of the above-quoted statement is that it obliquely sanctions the use of disparate impact analysis when a plaintiff has attacked only the "sum" or cumulative effect of a company's employment practices. In essence, the panel says that a disparate impact analysis is appropriate even when a plaintiff has proven nothing more than the simple fact that an employer has a higher percentage of blacks at the lower levels of the workforce than at the higher levels. This is clearly antithetical to the prior teachings of this Court, see e.g., *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 352 (8th Cir. 1972) *then McDonnell Douglas, supra*, 411 U.S. at 805-06. In that instance this Court pointed out that the Eighth Circuit's reliance on *Griggs* was misplaced and that disparate impact analysis is properly limited to objective, mechanically-applied employment devices. Other Circuit Courts of Appeal have recognized that the cumulative effects of a company's employment practices are not properly analyzed under the disparate impact model of discrimination. *Pouncy, supra*, 668 F.2d at 800-801; *Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981); and, *Pope v. City of Hickory, North Carolina*, 679 F.2d 20, 22 (4th Cir. 1982). Indeed, even the Eighth Circuit paid lip service to this concept in *Harris, supra*. In that case a different panel than the one

herein said that subjective evaluation and decision-making systems are not the types of practices banned by *Griggs* and cannot form the basis of a disparate impact claim. Even the Equal Employment Opportunity Commission appears to have fallen into line. In Appeal No. 01811187, dated May 21, 1982, the Commission affirmed a final agency decision which clearly stated that subjective evaluation criteria, manifested through an underrepresentation of blacks in one area of an employer's workforce, do *not* give rise to a claim of disparate impact. In summary, the claims raised herein were properly considered under the disparate treatment model. This Court should take its first opportunity to delineate, once and for all, the appropriate scope of disparate impact analysis.

The writers of this brief are all too well aware of the fact that, inasmuch as the case was *ostensibly* analyzed under the disparate treatment model, this question may not be properly before the Court. Nevertheless, we submit that this misconception as to the proper scope of disparate impact analysis *is* important. The panel seems to assume that there is no difference between disparate impact and disparate treatment. Such a misconception cannot help but taint the panel's consideration of evidentiary matters. It is especially disastrous here because the panel engaged in an exhaustive reevaluation of the basic facts of the case while, at the same time, cited little or no case authority supportive of its analysis thereof.

II. *THE EIGHTH CIRCUIT PANEL COMPLETELY IGNORED PROBATIVE AND COMPELLING EVIDENCE OF THE ABSENCE OF DISCRIMINATORY INTENT*

The trial court and the appellate panel (at least tacitly) analyzed plaintiff's claims under the *McDonnell Douglas* disparate treatment theory. It is well established that, in order

to prevail under this theory, a plaintiff must prove that the employer *intentionally* engaged in prohibited discrimination [2]. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1133 n. 7 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981).

Proof of discriminatory purpose, i.e., intent, is pivotal in establishing a disparate treatment claim. *Id.* Despite the critical nature of such proof, the appellant panel completely ignored the implications of the bank's affirmative action plan relative to the issue of discriminatory purpose. The district court credited the bank with *voluntarily* implementing an *aggressive* affirmative action program in the early 1970's, *Paxton v. Union National Bank*, 519 F. Supp. 136, 144 (E.D. Ark. 1981), and the panel stated that "the bank must be given credit" for the adoption of this program. O. at 20-21. The rest of the appellate panel's opinion, however, shows little or no evidence that such "credit" was actually extended. Indeed, despite the existence of this affirmative action plan, the panel takes every available opportunity to *assume* that Union National Bank was harboring an invidious racial animus. Such an assumption is unwarranted when one considers the length and breadth of the bank's affirmative action efforts.

Certainly, the existence of an affirmative action program under which the bank aggressively sought to hire blacks, even to the extent of developing a special program to train blacks for banking positions, 519 F. Supp. at 145, has a direct bearing on the presence of any intent to discriminate against blacks in promotions. It makes little sense for an employer to engage in such aggressive and

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[2] That this requirement is logical and necessary becomes obvious when one remembers that the whole purpose behind the disparate treatment model of discrimination is to provide redress for minority employees who are, because of their race, color, religion, sex or national origin, treated differently than similarly situated white employees. *Teamsters, supra*, 431 U.S. at 335 n. 15. Intent is an obvious and integral element of this type of discrimination.

wholly voluntary affirmative action efforts as those described by the district court, 519 F. Supp. at 144-45, while simultaneously harboring the intent to individiously discriminate against the persons so ardently recruited.

The writers of this *amicus* brief are concerned with the practical effects of the Eighth Circuit's treatment of this issue. The casual (seemingly offhanded) manner in which the panel dismissed the bank's affirmative action efforts could possibly have disastrous long-range consequences. In practical terms the message sent to employers and their attorneys can be aptly summarized as follows: One need not bother with the effort and expense of an affirmative action program because, in the final analysis, it is of little or no value in protecting one from liability. [3] Instead of a shield for the defense, it becomes a sword for the Plaintiff.

Surely that message is not one this Court wishes to be widely disseminated. Certiorari should be granted if for no other reason than to address this issue alone.

III. *THE EIGHTH CIRCUIT PANEL BASED ITS FINDING OF DISCRIMINATION IN THE AREA OF PROMOTIONS SOLELY UPON RAW, WHOLE-UNIVERSE DATA COMPLETELY BEREFT OF STATISTICAL SIGNIFICANCE.*

If this were an ideal world wherein all people had the same abilities and interests as well as identical education and experience, then, perhaps, simple descriptive statistics would be

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[3] The employer's dilemma is exacerbated by the fact that implementation of an affirmative action program will, as it did for Union National Bank, at least initially, create a significant influx of blacks and other minorities into the lower levels of the workforce. Only a fool would implement such a program if, as the Eighth Circuit panel herein seems to indicate, O. at 22, liability can be predicated solely upon the simple fact that there are more blacks in the lower levels of the workforce than in the higher levels. See, Section III below.

sufficient to prove discrimination. In such a world the mere fact that an employer has X percentage of blacks in the workforce, Y number of white supervisors and Z number of black supervisors might be sufficient to demonstrate bias in the selection process because everyone would have identical qualifications. Such an environment, however, does not and cannot exist. People do differ and those differences must be considered when reviewing employment decisions for the presence of prohibited discrimination. Indeed, to gauge the presence or absence of discrimination solely on the basis of such a simplistic analysis would clearly contravene the express provisions of Title VII, *see*, 42 U.S.C. §2000e-2(j).

Consequently, this Court has held that such an observed discrepancy, in order to be meaningful, must be statistically significant. To be statistically significant the discrepancy must be outside the range of variation which could, in the normal course of events, be attributed to random chance. This Court has even gone so far as to clearly define the acceptable range of variation, holding that discrimination can be inferred, " . . . if the difference between the expected value and the observed number is greater than two or three standard deviations, . . . " *Hazelwood School District v. United States*, 433 U.S. 299, 309 n. 14 (1977) *quoting Castaneda v. Partida*, 430 U.S. 482, 497 n. 17 (1977). Clearly implied is the fact that an observed difference cannot support an inference of discrimination if it is less than two or three standard deviations from the expected norm. Indeed, even the Eighth Circuit appeared to accept this logical extension of *Hazelwood* when it said that, "[n]umbers *must be* statistically significant before one can properly conclude that any apparent racial disparity results from some factor other than chance." *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1133 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981) (emphasis added); accord, *Hameed v. International Ass'n of Bridge, Struc. & Ornamental Iron Workers, Local 396*, 637 F.2d 506, 513 (8th Cir. 1980); and, *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1259 (7th Cir. 1980).

Despite this persuasive and controlling precedent, the Eighth Circuit panel herein failed to apply any test of statistical

significance. To the contrary, it concluded that simple descriptive statistics, i.e., comparisons of raw numbers and simple percentages, were sufficient to establish class-wide discrimination on the basis of race in the area of promotions. O. at 23-25. It is interesting to note that the Eighth Circuit previously rejected such raw data as unmeaningful when faced with the exact same question in another action.

> The district court merely stated the actual number and percentage of black foremen for the three years in question and the number and percentage of black cement finishers on the First National Bank job during that period. To infer a prima facie case of discrimination from these numbers and percentages, the court needed to go beyond presentation of the raw data to application of an appropriate and recognized test for determining the statistical significance of any observed disparity. *See Mayor v. Educational Equality League*, 415 U.S. 605, 619-20, 94 S.Ct. 1323, 1332-1333, 39 L.Ed.2d 630 (1974) (rejecting as unreliable "simplistic percentage of comparisons" of the racial composition of a thirteen-member nominating panel and the population of Philadelphia).

Eubanks v. Pickens-Bond Const. Co., 635 F.2d 1341, 1349-50 (8th Cir. 1980).

That the panel neglected to make any determination of statistical significance is particularly disturbing when one notes that it completely ignored a credible analysis by the bank's expert showing no statistically significant disparity in promotions. The trial court placed special emphasis on it, 519 F. Supp. at 153, but the appellate court opinion makes no mention whatsoever of the analysis.

This case would provide the Court an excellent podium from which to underscore the importance of statistical significance in Title VII analysis. We respectfully request that Certiorari be granted for this purpose.

IV. *THE RELEVANT LABOR MARKET FOR A PROMOTIONS CASE IS NOT "ALL EMPLOYEES."*

Certainly it is axiomatic that statistical disparities, in order to be meaningful in the Title VII context, must compare the racial and demographic characteristics of those groups of persons actually impacted by the employment practice or system at issue. This Court has, consequently, held that a statistical disparity, to be probative, must offer a comparison of those actually employed to the pool of qualified applicants in the relevant labor market. *Hazelwood, supra*, 433 U.S. at 308. The Eighth Circuit panel herein violated this fundamental concept when it held that the pool of qualified applicants for promotions at Union National Bank was comprised of all "employees currently employed in the bank." O. at 22. The panel went on to base its finding of discrimination on a "substantial disparity between black employees available within the bank and the proportions actually promoted." O. at 25. In essence, the panel based its conclusion that the bank's selection process was purposefully discriminatory solely upon the fact that it has a higher percentage of blacks in the lower levels of the workforce than in the higher levels. This approach was and is inappropriate for several reasons.

First, in this particular case, it was based upon an incorrect factual predicate. The panel chose "all employees" as the appropriate pool because "[t]he bank's stated policy was and is to promote from within . . . " O. at 22. This statement fails to come to grips with two crucial facts: (1) The bank's Personnel Policy Manual, quoted extensively in the panel's opinion, says that "[t]he Bank policy on filling openings is to do so from within *where possible.*" O. at 22. (emphasis added); and, (2) it is uncontroverted that about twenty-five percent (25%) of the bank's above-entry level positions and approximately fifty percent (50%) of its highest level managerial and technical positions are filled from outside the current workforce. O. at 23. For the panel's

analysis to be scientifically valid, they should have defined the relevant labor market in this case as a weighted average between current employees and the general populations possessing the necessary qualifications.

Second, the panel's approach was inappropriate because it was based upon insufficient legal precedent. It cited three (3) cases, *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-621 (1974); *Rivera v. City of Wichita Falls*,665 F.2d 531, 541 n. 16 (5th Cir. 1982), and *Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 543-544 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981), for the proposition that comparison of the various levels of the bank's workforce with "general population statistics" was error. O. at 23. The panel's reliance is misplaced. *Mayor v. Educational Equality League* does, indeed, reject as unreliable "simplistic percentage comparisons" of the racial composition of a nominating panel and the population of Philadelphia. By no stretch of the imagination, however, does it even remotely reflect upon the viability of a scientifically conducted statistical comparison of the different levels of a Title VII defendant's workforce and the general population of the relevant labor market with the requisite skills to do the job.

The panel's use of *Fisher* is even more puzzling. In that case the Fifth Circuit clearly endorsed comparisons with general population figures to establish "compelling underrepresentation." 613 F.2d at 544. True enough, it did sanction comparisons between racial make-up in selected positions and the racial composition of the total workforce *in some cases*. However, it expressly limited such comparisons to instances wherein " . . . a company adopts a policy and practice of hiring in at low level unskilled jobs and promoting to upper-level positions based upon training received and skills developed at the plant itself . . ." 613 F.2d at 544. Obviously, even under the express language of *Fisher*, such a comparison is inappropriate in this case because Union National Bank does, in fact, fill a significant number of vacancies from outside its workforce.

The Fifth Circuit did precisely the same thing in *Rivera*. Footnote number 16 cited by the appellate panel, did, indeed, sanction the occasional use of internal comparisons. The rest of the note, however, contains the following disclaimer:

> [i]t is necessary to show not only a compelling level of comparative underrepresentation, but *also* a policy of filling upper level positions through promotion of employees hired at entry-level and trained by the company in the requisite skills.

665 F.2d at 541 n. 16. (emphasis added) Obviously, these three cases provide little or no support for the panel's radical position.

The third, and most important, objection to the panel's approach is that it incorrectly assumes that *all* employees are equally qualified for and desirous of *all* jobs. In *Rivera* the court recognized the fallacy of this assumption.

> The *Hazelwood* rule requires that the relevant labor pool be tailored to eliminate those whose exclusion from the positions in issue could be attributed to want of the requisite skills.

665 F.2d at 540.

> Proof of a policy favoring promotion does not, however, automatically invoke this "internal comparison" variant of labor pool definition. Plaintiffs seeking to use this approach are, no less than those applying external comparison methodologies, required by *Hazelwood* to identify those segments of the existing workforce qualified, by reason of training or experience, to assume the higher level positions at issue. In other words, the percentage of minority workers in all lower level positions combined will not, without more, be considered to be the relevant labor market from which upper level positions would be filled. Rather, the lower level positions must be differentiated by degree of ability in order to identify those which are the resource from which promotions to the positions in issue would be made.

655 F.2d at 541. Accord, *Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 103-105 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979). (The labor pool from which supervisors are drawn consists only of those lower level employees with adequate education, experience and ability to perform supervisory jobs.); *Pouncy, supra*, 668 F.2d at 803; *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 400-401 (2nd Cir. 1981); and *Wilkins v. University of Houston*, 654 F.2d 388, 401 (5th Cir. 1981).

With regard to this issue it is important to keep one additional fact in mind. The plaintiff has the burden of establishing the proper definition of the pool of qualified applicants as a necessary element of his *prima facie* case. *Eubanks, supra; Hebert v. Monsanto Co.*, 682 F.2d 1111, 1126 (5th Cir. 1982); and, *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1258 (7th Cir. 1980, "If an improper pool was utilized the statistics have no value and fail to establish a prima facie case." Plaintiffs herein dismally failed to shoulder this burden.

Certiorari should be granted if for no reason other than to specifically define the circumstances in which an internal comparison is appropriate.

V. *EVEN IF AN INTERNAL COMPARISON WERE APPROPRIATE, THE EIGHTH CIRCUIT PANEL'S ANALYSIS WAS INADEQUATE.*

Even if this Court determines that an internal comparison was appropriate, the Eighth Circuit panel's decision is still clearly unsupportable. Receipt of 11% of all promotions, O. at 24, while comprising only 16.7% of the total workforce, 519 F.Supp. at 148, can hardly be said to constitute a "compelling underrepresentation." Please note, also, that the panel ignored undisputed evidence submitted by the bank which clearly demonstrated the absence of a legally cognizable disparity when the racial composition of *all* employees was compared to the racial composition of *all* those receiving promotions for each

year from 1974 through 1980. Defendant's Exhibit 34(a). This oversight is particularly egregious since this exhibit was specifically adopted by the district court as a finding of fact and served as part of the evidentiary basis for its finding of no discrimination. 519 F.Supp. at 153.

VI. *THE EIGHTH CIRCUIT PANEL SUBSTITUTED ITS OWN INTERPRETATION OF THE RECORD FOR THE TRIAL COURT'S FINDINGS OF FACT IN VIOLATION OF THE CLEARLY ERRONEOUS RULE*

Rule 52(a) of the Federal Rules of Civil Procedure says in pertinent part that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Considerations of judicial economy and effectiveness underlying this rule have long since prompted this Court to hold that the function of an appellate court is "not to decide factual issues *de novo*," *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969), and that, where the evidence can support two conflicting views, it is not clear error for the trial court to decide in favor of one view over the other. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). [4]

The Eighth Circuit has taken the next logical step. In *St. Louis Typographical Society Union No. 8 v. Herald Co.*, 402 F.2d 553, 557 (8th Cir. 1968) it held that, in an instance wherein the evidence is supportive of more than one position, the clear commands of Rule 52(a) are not voided merely because the appellant court would have decided the case differently. And in *Pickens-Bond Const. Co. v. United Brotherhood of Carpenters*

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[4]This is, essentially, the situation in the case at bar. It was a long (6,000 page transcript), complicated and hotly-contested lawsuit. An avid advocate for either party can search the record and find *some* evidence supportive of his position. Nevertheless, the trial judge made extensive and detailed findings of fact for which there is certainly substantial evidentiary support. That it might be possible to reach a contrary conclusion, if one were inclined to do so, is not sufficient to avoid the clear commands of Rule 52(a).

and Joiners, Local 690, 586 F.2d 1234 (8th Cir. 1978) the circuit established the practical standard against which findings of fact are to be measured.

> Findings of fact by a trial court sitting without a jury are presumed correct and cannot be set aside unless clearly against the weight of the evidence when viewed in the light most favorable to the prevailing party. *Anderson v. Federal Cartridge Corp.*, 156 F.2d 681 (8th Cir. 1946); Fed.R.Civ.P. 52 (a).

Id. 586 F.2d at 1239.

The Eighth Circuit panel herein completely ignored the dictates of *Hazeltine* and *Yellow Cab* and, in point of fact, imposed a much more rigorous standard of review than that defined in *Pickens-Bond*. With regard to the issue of class-wide discrimination in the area of promotions the panel engaged in a pointed and extensive factual inquiry. It found supportable findings of fact to be clearly erroneous and substituted its own interpretation of the record for that of the trial judge. That the panel erred is evidenced by three (3) simple facts.

A. *The trial judge's findings of fact are clearly supportable.*

The trial judge based his finding of no discrimination in the area of promotions primarily upon credible *and uncontroverted* statistical evidence presented by Dr. James Gwartney, a professor of economics from Florida State University specializing in labor economics, economics of discrimination and micro-economics. 519 F.Supp. at 142. His analysis of Union National Bank revealed the following facts. Black representation at *all levels* of the bank's workforce was and is either greater than or within an acceptable range of deviation from their expected representation when compared with their availability in the relevant labor market. 519 F.Supp. at 148-150. Education, seniority and work experience appear to be the determinant variables with regard to earnings levels. 519 F.Supp. at 163. And, most importantly, there has been no significant disparity

between the number of blacks in the bank's employ and the number of blacks receiving promotions. Defendant's Exhibit 34(a), 519 F.Supp. at 153. In fact, as the district court noted, " . . . in every year beginning in 1974, with the exception of 1978, blacks have been promoted at a far higher rate than would be expected. The difference in 1978 was insignificant." 519 F.Supp. at 153.

It is truly difficult to comprehend how the trial court's reliance on such persuasive evidence, particularly when viewed in the light most favorable to the defendant, can be construed to be so contrary to the weight of the evidence as to permit a finding that it was clearly erroneous.

B. *The panel's decision is clearly based upon an impermissible independent consideration of the totality of the circumstances found in the record.*

The Eighth Circuit panel's decision to reverse the trial judge came "[a]fter a careful review of the 6,000 page transcript and the 150 exhibits comprising [the] record on appeal." O. at 20. The rest of the opinion surely indicates that they did, indeed, make just such an independent, exhaustive review of the record. This extensive review, apparently conducted in an effort to ferret out those facts consistent with the panel's view of the case, was clearly violative of the express strictures of Rule 52(a) and the commands of this Court in *Pullman-Standard v. Swint*, ____ U.S. ____, 75 L.Ed.2d 66, 50 U.S.L.W. 4425 (1982). In *Swint*, precisely as in the instant case, the circuit court rejected a trial court's finding of no discrimination after an extensive review of the record and substitution of its own findings for those of the trial judge. This Court held that a finding of clear error is itself error if it is, " . . . the product of the court's independent consideration of the totality of the circumstances it found in the record." *Id.*, 72 L.Ed.2d at 81. That the appellant panel herein conducted just such an independent consideration becomes patently obvious when one reads consecutively the district court's opinion and then the panel's opinion. The panel consistently ignores probative, even compelling, evidence

supportive of the trial judge's findings while, at the same time, relying almost exclusively upon evidence specifically characterized as unreliable by the trial judge or upon evidence of limited probative value.

C. *The panel obviously substituted its own judgment for that of the trial court as to the weight to be given to particular evidence.*

In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, 72 L.Ed.2d 606 (1982) this Court said that an appellate court may not set aside a district court's findings of fact as clearly erroneous merely because it would have given more or less weight to particular evidence than did the trial judge.

> Determining the weight and credibility of the evidence is the special province of the trier of fact.
>
> * * *
>
> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' *United States v. Real Estate Board*, 339 U.S. 485, 94 L.Ed. 1007, 70 S.Ct. 711 (1950).

Id., 72 L.Ed.2d at 618.

The above-quoted language is applicable to the instant case. The district court based its finding of no discrimination in the area of promotion primarily upon statistical evidence showing no significant disparities in promotion ratios. The appellate panel, however, completely ignored this evidence, looked elsewhere in the record and relied exclusively on mere descriptive statistics—evidence the trial judge thought to be of little value.

What we have, then, is a disagreement between the trial judge and the appellate panel as to the relative weight to give different types of statistical evidence. The courts have recognized that the primary responsibility for evaluating statistical evidence and expert testimony rests with the trial court. *Inmates of Neb. Penal and Corr. Complex v. Greenholtz*, 567 F.2d 1368, 1376 (8th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978); *Taylor v. Teletype*, *supra*, 648 F.2d at 1134; and *Hazelwood*, *supra*, 433 U.S. at 312. In this case the district judge shouldered his responsibility and, ultimately, found the statistical evidence adduced by the bank to be more persuasive. He should not be overturned merely because the appellate panel, were it free to do so, would afford relatively more weight to some statistics than to others.

Clearly, the appellate panel violated the express dictates of Rule 52(a). Appellate usurpation of duties properly delegated to the trial courts defeats the orderly and efficient adjudication of issues. This Court should exercise its supervisory powers here to properly limit the scope of appellate review.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that Certiorari be granted and the judgment of the Court of Appeals be reversed.

Dated, January 24, 1983.

Respectfully submitted,

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